TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 584

HONORABLE MICHAEL J. ROCHE, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, ET AL., PETITIONERS

vs.

EVAPORATED MILK ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 12, 1942
CERTIORARI GRANTED FEBRUARY 8, 1943

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1 In the United States Circuit Court of Appeals
for the Ninth Circuit

No. —

EVAPORATED MILK ASSOCIATION, THE BORDEN COMPANY, CARNATION COMPANY, PET MILK COMPANY, PET MILK SALES CORPORATION, NESTLE'S MILK PRODUCTS, INC., LIBBY, MCNEILL & LIBBY, INC., SEGO MILK PRODUCTS COMPANY, ARMOUR AND COMPANY OF DELAWARE, GOLDEN STATE COMPANY, LTD., CHALLENGE CREAM & BUTTER ASSOCIATION, (INC.), MILK PRODUCERS' ASSOCIATION OF CENTRAL CALIFORNIA, INC., CONSOLIDATED DAIRY PRODUCTS COMPANY, MEYENBERG MILK PRODUCTS COMPANY, SWIFT AND COMPANY, DAIRYMAID CREAMERIES, LTD., MORNING MILK COMPANY, FOOD AND GROCERY BUREAU OF SOUTHERN CALIFORNIA, INCORPORATED, CENTRAL CALIFORNIA RETAIL GROCERS AND MEAT DEALERS ASSOCIATION, FOOD TRADES INSTITUTE, CENTRAL COAST COUNTIES ASSOCIATION OF RETAIL GROCERS, INC., FOOD INDUSTRY BUREAU, INC., SAN DIEGO COUNTY GROCERS' FAIR TRADE PRACTICE COMMITTEE, WESTERN WASHINGTON WHOLESALE GROCERS ASSOCIATION, DAN F. STILLING, L. A. HUMASON, WILLIAM T. NARDIN, D. F. NORTON, PHILIP G. KINZER, A. W. RAMSDELL, EARL L. MILLER, GEORGE LOCKHART, G. H. BENKENDORF, C. W. HIBBERT, SIEGFRIED P. HARTER, RALPH WANZER, J. F. VALOIS, JEAN N. BISTLINE, E. C. PORTMAN, GEORGE CAMPBELL, JOHN P. MEYENBERG, JR., RUSSELL S. WALTZ, FRANK E. RICE, AND WILLIAM HENRY, PETITIONERS

vs.

HONORABLE MICHAEL J. ROCHE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, RESPONDENTS

2 *Application for leave to file a petition for writ of mandamus or other appropriate writ*

Filed Jan. 28, 1942

The above-named petitioners respectfully pray leave to file the within petition for a writ of mandamus or other appropriate writ directed to the Honorable Michael J. Roche, Judge of The District Court of the United States for the Northern District of California, Southern Division, and The District Court of the United States for the Northern District of California, Southern Division.

Dated: January 28, 1942.
Respectfully submitted.
Pillsbury, Madison & Sutro—Pillsbury, Madison & Sutro; Marshal P. Madison—Marshall P. Madison; Francis R. Kirkham—Francis R. Kirkham; Morrison, Hohfeld, Foerster, Shuman & Clark—Morrison, Hohfeld, Foerster, Shuman & Clark; Herbert W. Clark—Herbert W. Clark; Dunne & Dunne—Dunne & Dunne;
3 Arthur B. Dunne—Arthur B. Dunne; Webb, Webb & Olds—Webb, Webb & Olds; U. S. Webb—U. S. Webb; Walter K. Olds—Walter K. Olds; Brobeck, Phleger & Harrison—Brobeck, Phleger & Harrison; Maurice E. Harrison—Maurice E. Harrison; Willis I. Morrison—Willis I. Morrison; Lee M. Olds—Lee M. Olds; Joseph A. Murphy—Joseph A. Murphy; Nat Brown—Nat Brown; J. Wesley Cupp—J. Wesley Cupp; E. R. Hoerchner—E. R. Hoerchner; M. E. Foley—W. E.
4 Foley; James E. Foley—James E. Foley; Patrick A. Geraghty—Patrick A. Geraghty, attorneys for the several petitioners.

[File endorsement omitted.]

5 [Title omitted.]

In United States Circuit Court of Appeals

Order granting leave to file petition for writ of mandamus

Jan. 28, 1942

Upon consideration of the petition of Evaporated Milk Association, et al., for leave to file petition for writ of mandamus herein, and good cause therefor appearing, it is ordered that said petition for leave to file petition for writ of mandamus be, and hereby is granted.

6 In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title omitted.]

7 *Petition for a writ of mandamus or other appropriate writ*

Filed Jan. 28, 1942

The above-named petitioners respectfully allege:

I.

A writ of mandamus or other appropriate writ should be issued by this court to compel respondents to vacate the order hereinafter referred to and to grant petitioners a jury trial on the issues tendered by their pleas to the jurisdiction in the hereinafter mentioned cause.

This court has jurisdiction to issue the writ herein prayed (Judicial Code, sec. 272, 28 U. S. C., sec. 377). The said cause is within the appellate jurisdiction of this court (Judicial Code, sec. 128 (a), 28 U. S. C., sec. 225 (a)), and the issuance of the writ as herein prayed is necessary to the end that the appellate jurisdiction of this court may be seasonably and effectually exercised and to the end that justice shall be secured to petitioners who have no other plain, speedy, and adequate remedy.

II

On June 3, 1941, in the March 1941 term of respondent court, there was returned and filed in said court a paper entitled "United States of America v. Evaporated Milk Association, et al., No. 27,257-R, Indictment," in which petitioners and others were named as defendants. This alleged indictment pur-
8 ports to charge petitioners with violations of sections 1 and 3 of the Sherman Anti-trust Act (15 U. S. C., secs. 1, 3). (A copy of said purported indictment is attached hereto marked "Exhibit A," and by this reference made a part hereof.)

III

The grand jury which returned the indictment was originally impaneled for the November 1940 term of respondent court. Said grand jury had no jurisdiction to return the indictment

in the March 1941 term except as authorized by section 284 of the Judicial Code (28 U. S. C., sec. 421) which provides:

"A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, *solely to finish investigations begun but not finished by such grand jury.* * * *" [Italics ours.]

The November term of the grand jury expired at midnight, March 2, 1941.

IV

Purporting to act under section 284 of the Judicial Code, supra, counsel for the United States executed on February 25, 1941, and filed with respondent court on February 26, 1941, a petition alleging that certain investigations had then been begun but were not finished, and praying for an order of the court continuing the grand jury in sesion through the March 1941 term for the sole purpose of finishing *said* investigations.

9 (A copy of said petition is attached to the pleas to the jurisdiction hereinafter referred to and made a part hereof and marked "Exhibit G".)

On February 28, 1941, respondent court issued an order granting said petition and authorizing the November 1940 term grand jury to continue to sit during the March 1941 term for the sole purpose of finishing said investigations referred to in said petition.

(A copy of said order is attached to the pleas to the jurisdiction hereinafter referred to and made a part hereof and marked "Exhibit G.")

(The minutes of respondent court relating to said order and petition and showing the date of the filing of said petition with the court and the action of the court thereon are attached hereto, marked "Exhibit B," and by this reference made a part hereof.)

V

On March 4, 1941, at the beginning of the March 1941 term, five new grand jurors were added to the grand jury in place of one deceased and four excused grand jurors.

(The minutes of respondent court showing the addition and substitution of said grand jurors are hereinabove referred to, marked "Exhibit B".)

VI

On July 2, 1941, petitioners filed a motion for an order requiring (a) disclosure of the day on which the November 1940 term grand jury commenced its investigation of the matters which culminated in said indictment, and (b) disclosure of the attendance record of said grand jury.

10 Respondent court ordered that both disclosures be made.

VII

On August 6, 1941, purporting to comply with the first part of said order for disclosure, Charles S. Burdell, Esq., Special Attorney for the United States, affirmed in open court that the grand jury investigation of the matters set forth in said indictment "was begun shortly after November 6th—in any event begun during the November term."

(A transcript of so much of the proceedings of August 6, 1941, as relate to said disclosure is attached hereto, marked "Exhibit C" and by this reference made a part hereof.)

On August 6, 1941, in response to the second part of said order for disclosure, the attendance record of the grand jury was made a part of the record in said cause. This attendance record shows that the last session of the grand jury in the November 1940 term was held on February 28, 1941.

(A copy of said attendance record is attached hereto, marked "Exhibit D," and by this reference made a part hereof.)

VIII

Believing, after the above disclosure by counsel for the United States, that the investigation of the matters charged in said indictment began shortly after November 6th, petitioners filed motions to quash the indictment based upon the ground;

11 among others, that fewer than twelve of the grand jurors returning the indictment were present at a substantial number of the sessions of the grand jury during the November and March terms. This appeared from the fact that five new grand jurors were added at the commencement of the March 1941 term and, particularly, from the unusually large number of absences of grand jurors during the November 1940 term.

IX

To defeat this motion, counsel for the United States, in a brief filed on August 20, 1941, for the first time stated:

"During the November 1940 Term the Grand Jury was engaged in the consideration of routine matters; and the matters relating to the indictment now under attack were not considered until February 28, 1941."

February 28, 1941, was the last day on which the grand jury sat at the November 1940 term. It was two days after the date for beginning investigations under the order of the court continuing the grand jury in session.

On the basis of this new date given as the commencement of the investigation, the percentage of absences of grand jurors during the investigation of the matters alleged in this indictment was decreased over 50 per cent.

On August 22, 1941, at the hearing on the motion to quash government counsel made further disclosures in order to defeat petitioners' pending motions.[1] In answer to an in-
12 quiry by the court, government counsel stated as follows:

"Mr. BURDELL. The investigation commenced on or about February 28th.

"The COURT. That is your statement. You will have to develop that fact, whatever the fact may be.

* * * * *

"The COURT. Unless they accept a stipulation from you you will have to prove it.

* * * * *

"The COURT. Were you the one that presented it?

"Mr. BURDELL. Yes.

"The COURT. Was there anyone presented any testimony to the grand jury in this case before you did, do you know?

"Mr. BURDELL. I was present at every grand jury session, your Honor, when matters relating to this indictment were presented.

"The COURT. What was the first date that any testimony was taken before the grand jury, if you know?

"Mr. BURDELL. February 28, 1941."

(A transcript of so much of the proceedings of August 22, 1941, as are pertinent to the matters set forth in this petition is attached hereto, marked "Exhibit E," and by this reference made a part hereof.)

---

[1] Petitioners' motions were denied after this hearing.

At the same hearing government counsel read into the record in said cause the minutes of the grand jury of February 28, 1941. These minutes read as follows (see "Exhibit E"):

"Special meeting of the Federal Grand Jury held this day, Foreman Mrs. Hattie H. Sloss, presiding. Minutes of previous meeting read and approved as corrected (see below).[1] Special Assistant to the Attorney General Charles C. Pearce and
13 Special Assistant Charles S. Burdell continued the presentation of the investigation of the peach industry for violation of the Sherman Anti-Trust Act. There being no further business the meeting adjourned." Signed, "C. N. Alexander, Secretary," and "Approved Eva L. Gibson, Foreman, pro tem."

[1] "The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun. Other industries named as subject to investigation are Salmon industry, Canned Pineapple, Walnuts and Almond, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland. Asparagus and Cherries."

Government counsel did not disclose the text of the minutes of February 27th or shed any further light upon what happened on that day, although government counsel who was present at that session was in court with the minutes of that day in his possession. The minutes of February 28th, which were disclosed, show that on February 27th the grand jury was investigating the peach industry, since the minutes of February 28th recite that on the 28th government counsel "continued the presentation of the investigation of the peach industry." Moreover, the correction to the original minutes of February 27th—which was made by way of a subsequent addition—simply mentioned—"named"—sixteen nationwide industries, comprising in the aggregate virtually the entire food industry of the United States. No defendant in said indictment herein was even so much as "named."

14 X

The above disclosures by government counsel—showing that no investigation of the matters charged in this indictment was begun by the grand jury during the November 1940 term,

[1] See footnote on p. 6.

and that no such investigation was begun on or before February 26th, the latest possible date as of which the order of the court continuing the grand jury in session spoke—for the first time disclosed the lack of jurisdiction of the grand jury to return this indictment and of the court to try this cause. Accordingly, petitioners promptly filed pleas to the jurisdiction, alleging as a fact that no investigation of any matter mentioned in said indictment, and no investigation of any defendant mentioned therein, was begun during the November 1940 term, and that no investigation of said matters or of said defendants was begun on or before February 26, 1941; that, therefore, said grand Jury was without jurisdiction to return the indictment and respondent court without jurisdiction over the cause.

(One set of pleas to the jurisdiction was filed on behalf of petitioner Carnation Company on August 29, 1941; a similar set of pleas was filed on behalf of all other petitioners on September 13, 1941. Copies of said pleas are attached hereto, marked, respectively, "Exhibit F" and "Exhibit G," and by this reference made a part hereof.)

XI

On September 22, 1941, the government filed replications to each of said pleas to the jurisdiction. These replications were *denials* creating issues of fact. Thereupon petitioners became entitled to a jury trial as of constitutional right upon the issues raised by said pleas and replications. Petitioners demanded a jury trial. The government, in open court, conceded petitioners' right to such a trial. The court set the pleas down for trial by jury on December 3, 1941:

"Mr. DUNNE. * * * Now, the next thing to do will be to set this down for trial, your Honor.

"The COURT. On the plea?

"Mr. DUNNE. The plea to which a denial has been filed.

"Mr. BURDELL. There are two pleas.

"The COURT. What day?

"Mr. DUNNE. Any day.

"Mr. BURDELL. We want to get at this as fast as possible. Can it be set for tomorrow?

"The COURT. We cannot get a jury in by tomorrow. It will have to go over.

"Mr. BURDELL. Couldn't we try it before your Honor without a jury?

"Mr. DUNNE. You tell us what happened and I will submit it to his Honor, but if we must go at it blind let us have a jury.

"The COURT. Are you entitled to a jury as a matter of right?

"Mr. DUNNE. Yes.

"The COURT. Are you satisfied he is?

"Mr. BURDELL. Yes. I don't know what I can do about it if he insists on a jury. I do not see any reason why it cannot be tried by the Court.

16 "The COURT. He has already stated he has a right and he has asked for it, and it cannot be denied him.

"The CLERK. It will have to go over to December 3."

(A transcript of the above and related proceedings of September 22, 1941, is attached hereto, marked "Exhibit H," and by this reference made a part hereof.)

(A copy of the government's replications is attached hereto, marked "Exhibit I," and by this reference made a part hereof.)

XII

Shortly prior to December 3, 1941, the jury trial of the pleas was continued at the government's request to December 15, 1941.

XIII

On December 9, 1941, on the eve of trial and two and a half months after issue had been joined (and two and a half months after the United States, conceding the right of petitioners to a jury trial, had abandoned an earlier motion to withdraw its replications—see "Exhibit H"), the United States filed a second motion for leave to withdraw its replications and to strike said pleas.

(A copy of said motion is attached hereto, marked "Exhibit J," and by this reference made a part hereof.)

XIV

On January 28, 1942, respondent court granted said motion of the United States; the United States thereupon filed a motion to strike said plea in the form of the motion above

17 referred to and marked "Exhibit J"; the said respondent court granted said motion and struck petitioners' said pleas from the records. Petitioners thereupon moved the court to vacate its order striking said pleas, to reinstate said pleas and replications and to reset the pleas for jury trial. This motion was denied.

XV

All action hereinabove referred to which was taken by respondent court since June 3, 1941, was taken by and through respondent judge.

XVI

Petitioners were and are entitled as a matter of constitutional right to a jury trial on the issues raised by their pleas to the jurisdiction, and unless said action of respondent court in striking said pleas is corrected petitioners will be denied their right to a jury trial on said pleas.

XVII

A verdict for petitioners on said jury trial, to which petitioners are constitutionally entitled, would result in a quashal of the indictment herein and of all proceedings had thereunder, without subjecting petitioners and respondent court to the enormous burden and expense of a trial upon the merits.

XVIII

Petitioners are informed and believe and upon such
18 information and belief allege:

A trial on the merits of said indictment would take not less than 4 months and probably much longer. Petitioners, the defendants in said indictment, are 43 corporations, associations, and individuals comprising by far the greater part of the evaporated milk industry of the United States. They reside in all parts of the United States from New York to San Francisco and from Seattle to San Diego. The indictment covers activities of this large industry in ten western states, Puerto Rico, and Alaska, for a period of more than six years. It includes the activities of manufacturers, jobbers, brokers, and retailers.

During the entire period covered by said indictment the evaporated milk industry of the United States, including the petitioners herein, was operating under a license issued by the Secretary of Agriculture under the Agricultural Adjustment Act, as amended (48 Stat. 31; 49 Stat. 750) and the Agricultural Marketing Agreement Act (50 Stat. 246). A trial on the merits of this case would necessitate not only calling as witnesses numerous members of the industry, including most of the leaders of the industry, but also calling as witnesses the representatives of the Department of Agriculture by whom and under whom the said license was enforced. These men, and most of the petitioners herein, are now engaged to the utmost of their capacity in
19 supervising the production of and in producing supplies for this nation and its allies to further the prosecution of the war. If the ruling of the district court is allowed to stand, petitioners will not only be denied their constitutional right to a jury trial of the pleas to the jurisdiction, but there will be

imposed upon petitioners, upon the witnesses, and the courts the wholly unwarranted and overwhelming burden of a large antitrust trial of an entire industry. Similar antitrust trials of large industries in the United States have lasted many months, and in at least one instance more than three years. Such trials cost in excess of hundreds of thousands of dollars. In connection with the indictment here under consideration, many thousands of separate documents have been subpoenaed from the files and records of the industry throughout the United States. The records of the Evaporated Milk Industry pertinent to the trial of this case consist of many thousands of documents. Individuals familiar with the facts of this industry and the matters alleged in said indictment have been called into the armed service of the United States and the existing war reasonably may be expected to render more difficult in many ways the trial of this large suit.

XIX

The pleas herein, upon which petitioners are entitled as of constitutional right to a jury trial, allege, upon the basis of the indisputable facts of record the lack of jurisdiction of the
20 grand jury and of respondent court. If said pleas are meritorious a trial on the merits would be utterly useless.

XX

No right of appeal lies from the said orders of respondent court which deny to petitioners their right to a jury trial on the pleas to the jurisdiction. Any remedy by way of appeal from a final judgment which might be entered against petitioners after trial on the merits would not afford petitioners a plain, speedy and adequate remedy with respect to the matters concerning which this application is made; any verdict in favor of petitioners after a trial on the merits would still leave petitioners denied of their right to a jury trial on their pleas and the accompanying right to free themselves from the burden of a trial upon an indictment invalid from the beginning. Petitioners have no plain, speedy and adequate remedy with respect to the matters alleged herein other than by the exercise by this Court of its power to issue its writ of mandamus or other appropriate writ as prayed.

Wherefore, petitioners pray that an alternative writ of mandamus issue from this court directed to the Honoroble Michael J. Roche, District Judge of The District Court of the United States, for the Northern District of California, Southern Division, and to the United States District Court for the
21 Northern District of California, Southern Division, requir-

ing said respondents to show cause why said order striking said pleas to the jurisdiction should not be vacated, said pleas and replications be reinstated and the issues raised thereby be set for jury trial.

Dated: January 28, 1942.

Respectfully submitted.

Pillsbury, Madison & Sutro, Marshall P. Madison, Francis H. Kirkham, Morrison, Hohfeld, Foerster, Shuman & Clark, Herbert W. Clark, Dunne & Dunne, Arthur B. Dunne, Webb, Webb & Olds, U. S. Webb, Walter K. Olds, Brobeck, Phleger & Harrison, Maurice E. Harrison, Willis I. Morrison, Lee M. Olds, Joseph A. Murphy, Nat Brown, J. Wesley Cupp, E. R. Hoerchner, W. E. Foley, James E. Foley, Patrick A. Geraghty, Attorneys for the several petitioners.

Duly sworn to by Francis R. Kirkham; jurat omitted in printing.

Exhibit A to petition

In the District Court of the United States of America, Northern District of California, Southern Division.

March Term, 1941

No. 27257-R

UNITED STATES OF AMERICA

v.

EVAPORATED MILK ASSOCIATION, ET AL.

UNITED STATES OF AMERICA, *Northern District of California, Southern Division, ss:*

INDICTMENT

The Grand jurors of the United States of America, duly impaneled, sworn, and charged in the District Court of the United States for the Southern Division of the Northern District of California, at the November 1940 Term of said Court, having begun but not finished during said November 1940 Term of said Court, an investigation of the matters charged in this indictment; and having continued to sit, by order of the said Court, in and for said Division and District during the March 1941 Term of said Court for the sole purpose of finishing investigations begun but not finished during said November Term of said

Court; and inquiring for said Division and District at the March 1941 Term of said Court, do, upon their oaths, find and present as follows, to wit:

26 COUNT ONE

Period of Time Covered by This Indictment

1. Each allegation in this indictment made that an act has been performed by any of the defendants herein shall be deemed to be an allegation that such act was performed within three years next preceding the date of the return of this indictment, unless otherwise expressly stated.

Definition of Terms

2. The term "evaporated milk" as used in this indictment means unsweetened cow's milk concentrated by removing part of its natural water content, after which it is homogenized to disperse the fat globules evenly and sterilized in hermetically sealed cans.

3. The term "evaporated milk manufacturers" as used in this indictment means those corporations, partnerships, and individuals which manufacture and distribute evaporated milk.

4. The term "jobbers" as used in this indictment means those individuals and companies in the Pacific Coast territory, as hereinafter defined, who are engaged in the business of selling and distributing evaporated milk at wholesale.

5. The term "retailers" as used in this indictment means those companies and individuals which engage in the business of selling and distributing evaporated milk to consumers.

6. The term "Pacific Coast territory" as used in this indictment means all of the territory included in the following States of the United States: Arizona, California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming.

THE DEFENDANTS

7. Evaporated Milk Association, hereinafter sometimes referred to as EMA, is hereby indicted and made a defend-
27 ant herein. EMA is a corporation, organized under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois; and, at all times and dates hereinafter mentioned, the membership of said defendant has included evaporated milk manufacturers. Defendant EMA has members who are required to pay dues based upon the amount of evaporated milk they sell, respectively. At all the times and dates herein men-

tioned defendant EMA has been engaged in performing certain services, which include, among others, the compiling and furnishing of periodic statistical data relating to production, stocks, shipments, sales, orders, prices, distribution practices, freight rates, legislative matters, trade promotion, legal advice, sanitary standards, research, and educational promotion. In excess of 85% of the evaporated milk produced and sold in the United States and substantially all evaporated milk sold in Alaska and Puerto Rico is manufactured and sold by the members of EMA, while practically all evaporated milk sold in the Pacific Coast territory is manufactured by the defendant major and independent companies, who are members thereof.

8. The following named companies, herein sometimes referred to as "major companies," are hereby indicted and made defendants herein.

Name of company	State of incorporation	Principal place of business
The Borden Company	New Jersey	New York, N. Y.
Carnation Company	Delaware	Milwaukee, Wis.
Pet Milk Company	Delaware	St. Louis, Mo.
Pet Milk Sales Corporation	Delaware	St. Louis, Mo.
Nestle's Milk Products, Inc.	New York	New York, N. Y.
Libby, McNeill & Libby, Inc.	Maine	Chicago, Ill.
Sego Milk Products Company	Utah	Salt Lake City, Utah

Each of said major companies is a corporation, duly organized and existing and authorized to do business under the laws of the State of incorporation as indicated above; and with principal place of business as indicated above. At all or a part
28 of the times and dates herein mentioned each of said major companies has been, and now is, directly and through subsidiaries and affiliates, engaged in business as an evaporated milk manufacturer; and each has been, and now is, a member of EMA, with the exception of said Pet Milk Sales Corporation, a subsidiary of said Pet Milk Company.

9. The following named companies, herein sometimes referred to as "independent companies," are hereby indicted and made defendants herein:

Name of company	State of incorporation	Principal place of business
Armour and Company of Delaware	Delaware	Chicago, Illinois.
Golden State Company, Ltd.	Delaware	San Francisco, Calif.
Challenge Cream & Butter Association, (Inc.)	California	Los Angeles, Calif.
Milk Producers' Association of Central California, Inc.	California	Modesto, Calif.
Consolidated Dairy Products Company	Washington	Seattle, Washington.
Meyenberg Milk Products Company	California	Salinas, California.
Swift and Company	Illinois	Chicago, Illinois.
Dairymaid Creameries, Ltd.	California	Oakland, California.
Morning Milk Company	Utah	Salt Lake City, Utah.

Each of said independent companies is a corporation, duly organized and existing and authorized to do business under the laws of the State of incorporation as indicated above, and with principal place of business as indicated above. At all or a part of the times and dates herein mentioned each of said defendants has been, and now is, directly and through subsidiaries and affiliates, engaged in business as an evaporated milk manufacturer or jobber; and each has been, and now is, a member of EMA, with the exception of said Challenge Cream & Butter Association (Inc.), Milk Producers' Association of Central California, Inc., Consolidated Dairy Products Company, Swift and Company, and Armour and Company of Delaware.

10. The following named associations are hereby indicted and made defendants herein. Each of said associations is either a voluntary unincorporated association or is a corporation, 29 duly organized and existing under the laws of the State of incorporation, as indicated below, and has the principal place of business indicated below. At all or a part of the times and dates herein mentioned, each of said associations has been engaged in promoting the interests of jobbers or retailers, as indicated below, in the sale of evaporated milk and other commodities:

Name of association	State of incorporation	Principal place of business	Promoting interests of
Food and Grocery Bureau of Southern California, Incorporated	California	Los Angeles, Cal	Retailers.
Central California Retail Grocers and Meat Dealers Association	California	Stockton, Calif	Retailers.
Food Trades Institute	California	San Francisco, California	Retailers.
Central Coast Counties Association of Retail Grocers, Inc	California	San Jose, Calif	Retailers.
Food Industry Bureau, Inc	California	Oakland, Calif	Retailers.
Oregon Trade Regulation Association	Oregon	Portland, Oregon	Jobbers.
San Diego County Grocers' Fair Trade Practice Committee	Unincorporated	San Diego, Calif	Retailers.
Western Washington Wholesale Grocers Association	Unincorporated	Seattle, Wash	Jobbers.

11. Whenever in this indictment reference is made to any act, deed, or transaction on the part of any defendant association, it shall be deemed to be an allegation that such act, deed, or transaction was performed or committed by said association at the instigation and under the control, domination, and direction of the officers, directors, committees, agents, and members of said association. And whenever in this indictment reference is made to any act, deed, or transaction on the part of any corporate defendant, such allegation shall be deemed to mean that the officers, agents, and employees of said corporation, and its subsidiaries

and affiliates, ordered or did such act, deed, or transaction for and on behalf of said corporation while actively engaged in the management, direction, and control of its affairs.

12. The following named individuals, hereinafter sometimes referred to as "individual defendants," are hereby indicted and made defendants herein:

Name	Position	Residence
Dan F. Stilling	In charge of Administration of the Evaporated Milk Industry.	Chicago, Illinois.
L. A. Humason	Vice Pres. and General Sales Manager, Meyenberg Milk Products Company.	Belmont, Calif.
William T. Nardin	General Manager, Pet Milk Company	St. Louis, Missouri.
D. F. Norton	President, Nestle's Milk Products, Inc	New York, N. Y.
Philip G. Kinzer	Vice President, Carnation Company	Milwaukee, Wis.
A. W. Ramsdell	Vice President, The Borden Company	New York, N. Y.
Earl L. Miller	Vice President, Golden State Company, Ltd.	San Francisco, California.
George Lockhart	President, Morning Milk Company	Salt Lake City, Utah.
G. H. Benkendorf	General Manager, Milk Producers' Association of Central California, Inc.	Modesto, Calif.
C. W. Hibbert	Treasurer and General Manager, Challenge Cream & Butter Association (Inc.).	Los Angeles, Calif.
Siegfried P. Hafter	Vice President and General Manager, Sego Milk Products Company.	Salt Lake City, Utah.
Ralph Wanzer	Superintendent of Libby, McNeill & Libby, Inc. Plant at Patterson, Calif.	Patterson, Calif.
J. F. Valois	Western Division Sales Manager, The Borden Company.	San Francisco, Calif.
Jean N. Bistline	Vice President in Charge of Sales, Nestles' Milk Products, Inc.	New York, N. Y.
E. C. Portman	Formerly Western Sales Manager for Carnation Company.	San Mateo, Calif.
George Campbell	District Sales Manager of Northwest Territory, Armour and Company of Delaware.	Portland, Oregon.
John P. Meyenberg, Jr.	President, Meyenberg Milk Products Company.	Salinas, California.
Russell S. Waltz	Vice Pres. and General Manager, Consolidated Dairy Products Company.	Seattle, Washington.
Frank E. Rice	Executive Secretary of EMA	Chicago, Illinois.
William Henry	Pacific Coast Manager, Pet Milk Sales Corporation.	San Francisco, Calif.

Each of said individual defendants resides at the respective address as indicated above, and has, during all or a part of the times and dates herein mentioned, been employed in the capacity indicated above. Each said individual defendant, while acting in said capacity, has authorized, ordered, and done the acts and things constituting the offense charged in this indictment.

13. Whenever in this indictment initials are used to describe and identify any individual defendant, the Christian or given name of such individual defendant is to the Grand Jurors unknown.

General Nature of the Business and Commerce Involved

14. Approximately 55% of the total milk produced in the United States is used in manufacturing dairy products. Of this amount, one of the major uses is in the manufacture of evaporated

milk. While the consumption of fresh milk has suffered a slight decline in recent years, the manufacture and sale of evaporated milk has increased in excess of 150% in the last 15 years. After canning, evaporated milk is packed in boxes or cases, each usually containing 48 cans. Shipments in 1939 of all brands exceeded 50,000,000 cases, over 7,000,000 cans being consumed each day in American homes. Government purchases for relief distribution alone in 1939 exceeded 220,000 cases.

15. In distributing evaporated milk the manufacturers and jobbers have adopted a policy of selling under brands names, designated on the label of each can. Practically all brands contain the same standards of quality, but certain brands are widely advertised and are referred to in the trade as "standard" or "advertised," as distinguished from unadvertised brands, often referred to as "secondary" brands. The standard brands are sold by major companies while secondary brands are sold by both the independent and the major companies.

16. Evaporated milk manufacturers operate condenseries in the majority of the States of the United States. Over 63% of the evaporated milk manufactured in the United States is processed in condenseries located in 12 North Central States near the Great Lakes, commonly known as the "dairy region." Of the remaining evaporated milk, the majority is manufactured in condenseries located in the New England and Mid-Atlantic
31 States and in the Pacific Coast territory. The greater part of the evaporated milk manufactured in the various States of the United States, including the States of the Pacific Coast territory, is sold and shipped in interstate commerce to purchasers located outside of the State from which such evaporated milk is sold and shipped.

17. Substantially all evaporated milk sold in the Pacific Coast territory and the Territories of Alaska and Puerto Rico is distributed by evaporated milk companies through jobbers, who in turn sell the same to retailers for resale to consumers. The major and independent company defendants herein together manufacture, ship, and sell substantially all of the evaporated milk distributed yearly in the Pacific Coast territory and the Territories of Alaska and Puerto Rico.

The Conspiracy

18. Beginning on or about June 1, 1935, and continuing thereafter to the date of the presentation of this indictment, and in the Northern District of California, and within the jurisdiction of this Court, defendants, and other persons to the Grand Jurors unknown, well knowing all of the foregoing facts, have

combined and conspired together for the purpose of fixing the prices of evaporated milk sold and distributed in interstate commerce, as aforesaid, in said Pacific Coast territory, and of maintaining said prices at artificial and noncompetitive levels; and, as intended by them, have fixed said prices and have maintained said prices at artificial and noncompetitive levels. In so doing defendants have then and there engaged in an unlawful combination and conspiracy in restraint of trade and commerce in evaporated milk among the several States of the United States in violation of Section 1 of the Act of Congress of July 2, 1890, known as the Sherman Antitrust Act. Said combination and conspiracy is hereinafter more particularly described.

19. As part of the said unlawful combination and conspiracy, and to effectuate the purposes thereof, defendants
33 have used divers means and methods, including the following, and other means and methods to the Grand Jurors unknown:

(a) Defendants have held meetings in the cities of Chicago, Illinois, and San Francisco, California, and other places to the Grand Jurors unknown, and at said meetings have discussed, determined, and agreed upon the prices to be charged for evaporated milk sold and distributed as aforesaid in interstate commerce in said Pacific Coast territory; and defendants have sold and shipped evaporated milk in interstate commerce as aforesaid at the prices so discussed, determined, and agreed upon to purchasers located in States other than the State from which such sales and shipments have been made.

(b) Defendants have agreed that "secondary" brands should be sold at arbitrary differentials below the prices of "standard" brands, and have sold and shipped evaporated milk in interstate commerce as aforesaid in said Pacific Coast territory in accordance with said price differentials so agreed upon to purchasers located in States other than the States from which such sales and shipments have been made.

(c) Defendants have attempted to cause and induce, and have caused and induced, evaporated milk manufacturers to sell and ship evaporated milk in interstate commerce as aforesaid in said Pacific Coast territory at the prices and in accordance with the price differentials so agreed upon, as aforesaid, to purchasers located in States other than the State from which such sales and shipments have been made.

(d) Defendants have discussed, determined, and agreed
34 upon the prices to be charged by jobbers and retailers for evaporated milk sold in interstate commerce as aforesaid in said Pacific Coast territory, and have attempted to coerce and induce, and have coerced and induced, said jobbers and retailers

to sell and distribute evaporated milk at the prices so discussed, determined, and agreed upon.

(e) Defendants have agreed upon and followed the practice and policy of interchanging among themselves detailed statistical data relating to production, stocks, shipments, sales, orders, and prices of evaporated milk, which said practice and policy, as intended by defendants, has aided defendants in fixing and maintaining the prices of evaporated milk sold and shipped in interstate commerce, as aforesaid, in said Pacific Coast territory.

(f) Defendants have arbitrarily agreed upon and designated the persons to whom and the places at which defendants will sell evaporated milk at jobber prices, that is to say, at the prices quoted by defendants for sale to jobbers.

Jurisdiction and Venue

20. The combination and conspiracy herein alleged has operated and has been carried out in part within the Southern Division of the Northern District of California, as follows: Several of the meetings referred to in paragraph 19 of this indictment have been held in the city of San Francisco, California, within said District and Division; the artificial and noncompetitive prices referred to in paragraph 18 of this indictment were put into effect in said District and Divison; and defendants made numerous sales in the said District and Division at said artificial and noncompetitive prices.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that said defendants, throughout the period aforesaid, at the places and in the manner and form aforesaid, unlawfully have engaged in a combination and conspiracy in restraint of the aforesaid trade and commerce among the several States of the United States contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT TWO

And the Grand Jurors aforesaid, upon their oaths aforesaid, inquiring as aforesaid, do hereby reallege, reallege, and incorporate, as if herein set forth in full, each of the allegations set forth in paragraphs 1 to 17, inclusive, contained in Count One of this indictment.

The Conspiracy

21. Beginning on or about June 1, 1935, and continuing thereafter to the date of the presentation of this indictment, and in

the Northern District of California, and within the jurisdiction of this Court, defendants, and other persons to the Grand Jurors unknown, well knowing all of the foregoing facts, have combined and conspired together for the purpose of fixing the prices of evaporated milk sold and distributed from States of the United States to purchasers in the Territories of Alaska and Puerto Rico, as aforesaid, and of maintaining said prices at artificial and noncompetitive levels; and, as intended by them, have fixed said prices and have maintained said prices at artificial and noncompetitive levels. In so doing defendants have then and there engaged in an unlawful combination and conspiracy in restraint of trade and commerce in evaporated milk in the Territories of Alaska and Puerto Rico and between said Territories and States of the United States in violation of Section 3 of the Act of Congress of July 2, 1890, known as the Sherman Antitrust Act. Said combination and conspiracy is hereinafter more particularly described.

22. As part of the said unlawful combination and conspiracy and to effectuate the purposes thereof, defendants have used divers means and methods, including the following, and other means and methods to the Grand Jurors unknown:

(a) Defendants have held meetings in the cities of Chicago, Illinois, and San Francisco, California, and other places to the Grand Jurors unknown, and at said meetings have discussed, determined, and agreed upon the prices to be charged for evaporated milk sold and distributed to purchasers in the Territories of Alaska and Puerto Rico; and defendants have sold and shipped evaporated milk from States of the United States to such purchasers at the prices so discussed, determined, and agreed upon.

(b) Defendants have agreed that "secondary" brands should be sold at arbitrary differentials below the prices of "standard" brands, and have sold and shipped evaporated milk from States of the United States in accordance with said price differentials so agreed upon to purchasers in the Territories of Alaska and Puerto Rico.

(c) Defendants have agreed upon uniform cash discounts to be accorded purchasers in the Territory of Puerto Rico, and have sold and shipped evaporated milk from States of the United States to purchasers in said Territory at the discounts so agreed upon.

(d) Defendants have followed the practice and policy of interchanging among themselves detailed statistical data relating to production, stocks, shipments, sales, orders, and prices of

evaporated milk, which said practice and policy, as intended by defendants, has aided defendants in fixing and maintaining the price of evaporated milk sold and shipped, as aforesaid, from States of the United States to purchasers in the Territories of Alaska and Puerto Rico.

37 Jurisdiction and Venue

23. The Combination and conspiracy herein alleged has operated and has been carried out in part in the Southern Division of the Northern District of California, as follows: Several of the meetings referred to in paragraph 22 of this indictment have been held in the city of San Francisco, California, within said District and Division, and the defendants made numerous sales within said District and Division at the prices discussed, determined, and agreed upon as alleged in said paragraph 22.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that said defendants, throughout the period aforesaid, at the places and in the manner and form aforesaid, unlawfully have engaged in a combination and conspiracy in restraint of the aforesaid trade and commerce in the Territories of Alaska and Puerto Rico, and between said Territories and States of the United States, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

A True Bill:

EVA G. GIBSON,
Foreman.

Dated: June 3rd, 1941.

TOM C. CLARK,
Tom C. Clark,
M. S. HUBERMAN,
M. S. Huberman,
Special Assistants to the Attorney General.

LAURENCE P. SHERRY,
CHARLES S. BURDELL,
FRED S. GILBERT, JR.,
JOSEPH L. ALIOTO,
Special Attorneys.

THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.

FRANK J. HENNESSY,
Frank J. Hennessy,
United States Attorney.

38 Exhibit B to petition

Wednesday, February 26, 1941. November 1940 Term

Before Honorable A. F. St. Sure, District Judge

IN THE MATTER OF THE REPORT OF THE UNITED STATES GRAND JURY

The United States Grand Jurors for the Northern District of California, for the November 1940 Term of this Court, this day came into Court at 11:10 a. m., and upon being called twenty (20) Grand Jurors answered to their names and were found to be present. Thereupon the Grand Jurors, through their foreman Mrs. Sloss, presented the following five (5) True Bills or Indictments, which the Court ordered filed and made records of this Court, ordered that Bench Warrants issue for arrest and appearance of defendants named, and that bonds for release be fixed in sums hereinafter mentioned, viz:

No. 27168-L—United States of America vs. Joseph F. Thureson for violation of Title 18 U. S. C. A., Sec. 408, transporting stolen automobile in interstate commerce. Bond, $2,500.00.

No. 27169-R—United States of America vs. James C. Eberhart for violation of Title 18 U. S. C. A., Secs. 277 and 283, making and possessing molds for counterfeiting and making counterfeit coins. Bond, $2,500.00.

No. 27170-S—United States of America vs. Joseph Triena for violation of Title 18 U. S. C. A., Secs. 398 and 399, transporting girl over interstate commerce for immoral purposes. Bond, $5,000.00.

39 No. 27171-L—United States of America vs. Ward C. Brown, Jr., for violation of Title 12, Sec. 592, making false entry in ledger of National Bank. Bond, $1,000.00.

No. 27172-W—United States of America vs. Redwood Lunch Club, Pacific Lumber Company, Hammond Redwood Company, Union Lumber Company, Holmes-Eureka Lumber Company, Dolbeer & Carson Lumber Company and Redwood Manufacturers Company, jointly, for violation of the Anti-Trust Laws, Act of Congress of July 2, 1890, Chapter 647, 26 Stat. 209.

(It was ordered that no citations issue as to case No. 27172-W, U. S. v. Redwood Lunch Club, et al.)

Robert B. McMillan, Esq., Assistant United States Attorney, and Charles C. Pearce, Esq., Special Assistant to the Attorney General, were present for and on behalf of the United States.

The Court advised the Grand Jruy that the United States Attorney and the Special Assistant to the Attorney General had made a joint application to the Court for an order extending the

existence of the Grand Jury into the March 1941 Term of this Court, solely for the purpose of completing certain investigations begun but not yet finished. The Court advised the Grand Jury that he would enter an order on February 28, 1941, authorizing said Grand Jury to continue to sit during the succeeding March 1941 Term of this Court, solely to finish investigations begun but not finished by said Grand Jury.

Therefore the Foreman Mrs. Sloss informed the Court that Grand Juror Walter R. Knight had died during the No-
40 vember 1940 Term; that Grand Juror Ralph H. Griffith had been ill and unable to attend the Grand Jury sessions since the beginning of the November 1940 Term, and that certain other Grand Jurors desired to be excused from further service as members of the Grand Jury after March 1, 1941.

Thereupon Messrs. Clinton D. Lasher, Hugh L. Davis, and Stanley G. Heyman stated it to be their desire to be excused from further service as members of the Grand Jury after March 1, 1941, and upon being required by the Court to do so, gave their reasons why they should be so excused from further service on said panel. Thereupon the Court advised said Grand Jurors Clinton D. Lasher, Hugh L. Davis, and Stanley G. Heyman that good and sufficient cause having been shown by them as to why they should be excused, the Court would, on March 4, 1941, at 2 o'clock p. m., enter a formal order excusing them from further service on said panel, as provided by Title 28 USCA, Section 421, and that at the same time and place the Court would also enter an order providing that Grand Juror Ralph H. Griffith be similarly excused from further attendance upon the Court as a member of said Grand Jury during the March 1941 Term of this Court, due to his continued Illness, as aforesaid.

The Foreman Mrs. Sloss further informed the Court that the Grand Jury would continue their deliberations today at 2 o'clock p. m., and would meet again on February 27, and 28, 1941. The Grand Jury was permitted to adjourn at the conclusion of
41 its session on February 28, 1941, until Tuesday, March 4, 1941, at 2 o'clock p. m. The court directed the Grand Jury to reconvene in the Court Room on Tuesday, March 4, 1941, at 2 o'clock p. m.

The Court further indicated that he would, upon the reconvening of the Grand Jury on Tuesday, March 4, 1941, at 2 o'clock p. m., enter a formal order excusing said Grand Jurors Clinton D. Lasher, Hugh L. Davis, Stanley G. Heyman, and Ralph H. Griffith, as above stated, as provided by Title 28 USCA, Section 421, and that he would at the same time and place enter an order as provided by Title 28 USCA, Section 421, impaneling five

other persons to take the places of said deceased Grand Jury and said excused Grand Jurors so as to complete the full panel of twenty-three (23) members.

IN THE MATTER OF THE DRAWING FROM THE JURY BOX THE NAMES OF TWENTY (20) PERSONS TO SERVE AS GRAND JURORS DURING THE MARCH 1941 TERM OF THIS COURT

It appearing to the Court that it will be necessary to continue the existence of the present Grand Jury duly impaneled at the November 1940 Term of this Court, into the March 1941 Term of this Court for the purpose of completing certain investigations begun but not yet finished by said Grand Jury; and it further appearing that on Tuesday, March 4, 1941, at 2 o'clock
42 p. m., the Court will, by formal order, excuse Grand Jurors Clinton D. Lasher, Hugh L. Davis, Stanley G. Heyman, and Ralph H. Griffith from further service as Grand Jurors on said panel, said Grand Jurors having furnished good and sufficient reasons for being so excused, and it further appearing that after March 4, 1941, at 2 o'clock p. m., there will be only eighteen (18) members remaining on said Grand Jury panel, due to the death of said Grand Juror Walter R. Knight, and due to the fact that said Grand Jurors Clinton D. Lasher, Hugh L. Davis, Stanley G. Heyman, and Ralph H. Griffith will be excused on Tuesday, March 4, 1941, at 2 o'clock p. m., from further service on said Grand Jury, as hereinabove stated, and the Court being of the opinion that there should be a full panel of twenty-three (23) members on said Grand Jury;

It is ordered, in accordance with Title 28 USCA, Section 421, that a Venire issue for twenty (20) persons to serve as Grand Jurors in the place and stead of said deceased Grand Juror and said Grand Jurors who will be excused, and that said Venire be returnable on Tuesday, March 4, 1941, at 10 o'clock a. m., before the Honorable Judge St. Sure, District Judge.

Thereupon the following names were publicly and in open Court drawn, by the Clerk, from the box containing the names selected to serve as Grand and Petit Jurors of this Court. Further ordered that the United States Marshal make service of said Writ by personal service. Said names so drawn are
43 as follows, to wit:

1. Ball, Mrs. Mary J., 527 12th Ave., San Francisco.
2. Boland, Barry W., 1380 Washington St., San Francisco.
3. Bowes, Mrs. Frances, 2651 Pierce St., San Francisco.
4. Brandenstein, Miss Agnes, 2298 Pacific Ave., San Francisco.
5. Brunsing, Mrs. Lulu V., 1850 Fulton St., San Francisco.
6. Collins, John T., 343 Sansome St., San Francisco.

7. Deutsch, C. J., Cleveland Tractor Co., 2660 Harrison St., San Francisco.
8. Eastham, Merrill T., 526 California St., San Francisco.
9. Graves, Bert I., c/o Tide-Water Asso. Oil Co., 79 New Montgomery St., San Francisco.
10. Hecht, Victor E., c/o Zellerbach Paper Co., 534 Battery St., San Francisco.
11. Herbert, George C., c/o Herbert Cooperage Co., 18th & Indiana Sts., San Francisco.
12. Hermann, Gerald F., 300 Front St., San Francisco.
13. Hodges, Brodie W., c/o Sperry Flour Co., 180 New Montgomery St., San Francisco.
14. Hurlburt, Frank H., 3026 Hillegass Ave., Berkeley; 58 Sutter St., San Francisco.
15. Klein, Pearl, 1725 North Point St., San Francisco.
16. Lough, Orville G., Jr., 282 Funston St., San Francisco.
17. Park, Mrs. Leah C., 1945 Broadway, San Francisco.
18. Rainey, Edward, 220 Montgomery, San Francisco.
19. Stater, Glen C., 720 Seabury Rd., Hillsborough; 1600 Van Ness Ave., San Francisco.
20. Williams, Allen V., c/o Armour & Co., 64 Pine St., San Francisco.

44 Tuesday, March 4, 1941. March 1941 Term

Before Honorable A. F. St. Sure, District Judge

IN THE MATTER OF THE EXCUSING FROM FURTHER GRAND JURY SERVICE OF FOUR MEMBERS OF THE PANEL OF THE NOVEMBER TERM 1940 GRAND JURY, SAID GRAND JURY HAVING BEEN AUTHORIZED TO CONTINUE TO SIT DURING THE MARCH 1941 TERM OF THIS COURT, AND CONCERNING THE SELECTION OF FIVE GRAND JURORS TO SIT IN THE PLACE AND STEAD OF ONE DECEASED GRAND JUROR AND FOUR GRAND JURORS TO BE EXCUSED.

Whereas a petition was duly filed with the Court by the United States Attorney and the Special Assistant to the Attorney General on February 26, 1941, requesting the entry of an order authorizing the November Term 1940 Grand Jury to continue to sit during the March 1941 term of this court, solely to finish investigations begun but not finished by said Grand Jury, and whereas at certain proceedings held in this Court on Wednesday, February 26, 1941, the Court indicated that an order would subsequently be entered authorizing said November Term 1940 Grand Jury to continue to sit during the succeeding term, towit: the March 1941 Term of this Court for the purposes aforesaid, and

whereas an order was entered by this Court on February 28, 1941, specifically authorizing said November Term 1940 Grand Jury to continue to sit during the March 1941 Term of
45 this Court, solely to finish said investigations begun but not finished by said Grand Jury, and whereas at said proceedings in this Court on Wednesday, February 26, 1941, the Court was advised by the Foreman of said Grand Jury, Mrs. Hattie Sloss, that Grand Juror Ralph H. Griffith had been ill and unable to attend the Grand Jury sessions since the beginning of the November 1940 Term, and that certain other Grand Jurors desired to be excused from further service as members of said Grand Jury during the March 1941 Term of this Court, and whereas Grand Jurors Clinton D. Lasher, Hugh L. Davis, and Stanley G. Heyman stated it to be their desire to be excused from further service as members of said November Term 1940 Grand Jury after March 1, 1941, and upon being asked by the Court to do so, gave their reasons why they should be so excused from said panel, and whereas the Court thereupon advised the said Grand Jurors Clinton D. Lasher, Hugh L. Davis and Stanley G. Heyman that good and sufficient cause having been shown by them as to why they should be excused, the Court would, if possible, at the appropriate time excuse them from further service on said panel, as provided by Title 28 USCA, Section 421, and whereas the Court further indicated that it would, if possible, also at the appropriate time excuse Grand Juror Ralph H. Griffith from further attendance upon the Court as a member of said Grand Jury during the March 1941 Term of this Court, due to his continued illness, as aforesaid, and good cause having been shown therefor, and whereas the said November 1940 Term
46 Grand Jury was permitted to continue its deliberations on February 27 and February 28, 1941, and was permitted by the Court to adjourn at the conclusion of its session on February 28, 1941, until Tuesday, March 4, 1941, at 2 o'clock P. M., when said Grand Jury was directed by the Court to reconvene in the Court Room for further instructions, and whereas an order was duly entered in this Court on February 26, 1941, directing that a Venire issue for twenty (20) persons to serve as substitute Grand Jurors, in the place and stead of said deceased Grand Juror and said four Grand Jurors to be excused, as aforesaid, and whereas said Venire was made returnable on Tuesday, March 4, 1941, at 10 o'clock a. m., before the Honorable A. F. St. Sure, District Judge, and whereas the names of twenty (20) persons were publicly and in open Court drawn by the Clerk from the box containing the names selected to serve as Grand and Petit Jurors of this Court, as provided by law, and whereas the United States Marshal, pursuant to the order of this Court, duly made

and entered on February 26, 1941, made service of said writ by personal service on the persons whose names were selected, as aforesaid, thereupon the following proceedings were had in Court at 10 A. M. on Tuesday, March 4, 1941.

47 IN THE MATTER OF THE IMPANELING OF FIVE SUBSTITUTE GRAND JURORS TO TAKE THE PLACES OF ONE DECEASED GRAND JUROR AND FOUR GRAND JURORS TO BE EXCUSED.

This being the return day of the Venire issued to summon twenty (20) persons to serve as United States Grand Jurors, for this Division and District, for the November Term 1940 of this Court, under the provisions of Title 28 USCA Section 421, and the United States Marshal having made his Return to the Venire, the Roll of persons summoned was called and the presence or absence of said persons noted and recorded in the Jury Roll book.

Ordered, that the following named persons, who were not present, be excused for the term, viz: C. J. Deutsch, Merrill T. Eastham, Victor E. Hecht.

Ordered, that the following named persons, who were present, be excused for the term, viz: John T. Collins, Bodie W. Hodges, Frank H. Hurlburt, Orville C. Lough, Jr., Edward Rainey, Glen C. Stater, Allen V. Williams, Mrs. Leach C. Park.

Thereupon, after being fully examined by the Court as to their qualifications for serving as substitute Grand Jurors on said panel, the following named persons, after said examination by the Court, were selected to be included as Grand
48 Jurors on the panel of said Grand Jury, authorized to continue to sit during the March Term 1941 as aforesaid, to-wit: Mrs. Mary J. Ball, Barry W. Boland, Mrs. Frances Bowes, Gerald F. Herrmann, Pearl Klein, and said persons were directed by the Court to appear in Court on Tuesday, March 4, 1941, at 2 o'clock P. M., to be duly sworn and impaneled as members of said Grand Jury as aforesaid. Charles C. Pearce, Esq., Special Assistant to the Attorney General, and Robert B McMillan, Esq., Assistant United States Attorney, were present for and on behalf of the United States.

IN THE MATTER OF IMPANELING NEW GRAND JURORS TO SIT DURING THE MARCH 1941 TERM OF THIS COURT

Tuesday, March 4, 1941, at 2:00 P. M., the following proceedings were had. The November Term 1940 Grand Jury came into Court at 2:00 P. M., with eighteen (18) Jurors present. The Court ordered that Grand Jurors Clinton D. Lasher, Hugh L. Davis, Stanley G. Heyman, and Ralph H. Griffith be excused

from further service on the panel of said November 1940 Grand Jury, good and sufficient reasons having been shown for their being so excused, as provided by Title 28 USCA, Section 421, and the Court directed Mr. Charles C. Pearce, Special Assistant to the Attorney General, to prepare a formal order ex-
49 cusing said jurors from further service as aforesaid, in accordance with the directions of the Court and prior proceedings herein. Also present were the five persons theretofore summoned and examined in prior proceedings for services on said Grand Jury panel, to-wit: Mrs. Mary J. Ball, Barry W. Boland, Mrs. Frances Bowes, Gerald F. Herrmann, Pearl Klein.

The Court directed the Clerk to administer the oath to said persons and to impanel them as additional members of said Grand Jury, whereupon said persons, Mrs. Mary J. Ball, Barry W. Boland, Mrs. Frances Bowes, Gerald F. Herrmann and Pearl Klein were duly sworn and impaneled as additional members of said Grand Jury, thereby making a full panel of twenty-three (23) members.

The Court advised the Grand Jury that they should continue their investigation of the matters being presented to them as expeditiously as possible, sitting, if necessary, three days a week to complete the investigations as early as convenient.

The Court further advised the Grand Jury that in order that the new members of the Grand Jury might become fully acquainted with those matters which had been begun but not yet finished by said Grand Jury, that it would be well for said Grand Jury to bring to the attention of the new members
50 of said Grand Jury all those matters which had been brought to the attention of the previous panel, and which they had already undertaken to investigate but which were not yet finished. Thereupon the Grand Jury was permitted to retire to the Grand Jury Room.

Wednesday, March 5, 1941. March 1941 Term

Before Honorable A. F. St. Sure, District Judge

IN THE MATTER OF THE REPORT OF THE UNITED STATES GRAND JURY FOR THE NOVEMBER 1940 TERM OF THIS COURT

The United States Grand Jurors for the Northern District of California, for the November 1940 Term of this Court, this day came into Court at 11:55 a. m., and upon being called 21 Grand Jurors answered to their names and were found to be present. Thereupon the Grand Jury Foreman, Mrs. Hattie H. Sloss, requested permission to leave the jurisdiction of this Court for

the period of sixty (60) days. Ordered that said request be granted. Mrs. Eva G. Gibson was appointed by the Court as Foreman Pro Tem of the Grand Jury for the November 1940 Term of this Court. Thereupon the oath of office was administered to said Foreman Pro Tem. The Grand Jury thereupon retired for further deliberations. Charles C. Pearce, Esq., Special Assistant to the Attorney General, was present for and on behalf of the United States.

51 *Exhibit C to Petition*

In the Southern Division of the United States District Court, in and for the Northern District of California

Before Hon. MICHAEL J. ROCHE, Judge

No. 27,257-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

EVAPORATED MILK ASSOCIATION, ET AL, DEFENDANTS

Wednesday, August 6, 1941, 10:30 o'clock A. M.

Counsel Appearing:

For the United States: Charles S. Burdell, Esq., Laurence P. Sherfy, Esq., Special Assistants to the Attorney General.

For Defendants Evaporated Milk Association, Borden Company, Pet Milk Company, Pet Milk Sales Corporation, Libby, McNeill & Libby, Sego Milk Products Company, Armour & Company of Delaware, Golden State Company, Ltd., William T. Nordin, Phillip G. Kinzer, A. W. Ramsdell, Early L. Miller, Siegfried P. Harter, Ralph Wanzer, J. F. Valois, E. C. Portman, George Campbell, and William Henry: Pillsbury, Madison & Sutro, by Eugene M. Prince, Esq.

For Defendants Nestle's Milk Products, Inc., D. F. Norton and Jean M. Bristline: Herbert W. Clark, Esq.

52 For Defendants Challenge Cream & Butter Association, (Inc.), Milk Producers Association of Central California, (Inc.), Consolidated Dairy Products Company, G. H. Benkendorf, and C. W. Hibbert: Messrs. Webb, Webb & Olds, and Wallace I. Morrison, Esq.

For Defendants Meyenberg Milk Products Company, L. A. Humason, and John P. Meyenberg, Jr.: Lee M. Olds, Esq.

For Defendant Swift & Company: Messrs. Brobeck, Phleger & Harrison, by T. L. Smart, Esq., and Robert Burns, Esq.

For Defendant Dairymade Creameries, Ltd.: Joseph A. Murphy, Esq.

For Defendants Morning Milk Company and George Lockhart: Nat Brown, Esq.

For Defendants Food & Grocery Bureau of Southern California, Inc.: J. Wesley Cupp, Esq.

For Defendants Central California Retail Grocers and Meat Dealers Association, Food Trades Institute, and Food Industries Bureau, Inc.: E. R. Hoerchner, Esq.

For Defendant Central Coast Counties Association of Retail Grocers, Inc.: W. E. Foley, Esq. and James W. Foley, Esq., by James W. Foley, Esq.

For Defendants Dan F. Stilling and Frank E. Rice: Eugene M. Prince, Esq., and Herbert W. Clark, Esq.

53 For Defendant Russel S. Waltz: Walter K. Olds, Esq. and Wallace I. Morrison, Esq.

(No appearances for Oregon Trade Regulation Association, San Diego County Grocers Fair Trade Practice Committee, and Western Washington Wholesale Grocers Association.)

(J. Wesley Cupp, Esq., appeared for B. W. St. Clair individually.)

* * * * *

Mr. PRINCE. * * * Now, the last point, your Honor, that was covered by the motion to disclose was more or less a formal one, and that is a fact also within the knowledge of counsel for the Government, and that is the date on which the investigation of this particular case started.

The COURT. I think the records disclose that somewhere. The Special Grand Jury commenced its investigations November 6, 1940—this is subject to correction; I don't want to be bound by it—and returned the indictment on May 29, 1941.

Mr. BURDELL. If the Court please, November 6, I believe, was the date of the impaneling, or possibly the first meeting of that grand jury. Now, it is possible—in fact, it is probable that no witnesses in connection with this particular case were called on that date, but that was the beginning of the sessions.

The COURT. And they could have voted the indictment before May 29th. Sometimes indictments are not returned to the Court until some period after the voting of the indictment, keep-

54 ing in mind the indictment, itself, is prepared and the details are taken care of before returning it to court. The indictment was not filed until June 3rd. However, that could happen in the very mechanics of getting it to the court.

The CLERK. May I say something? That probably means that they worked on the indictment and voted on it on that date, the last day, and then it was prepared and filed later.

The COURT. Does that cover the point, Counsel?

Mr. PRINCE. I think it does, your Honor. It is my understanding, in any event, that the Government—let me withdraw that. It is my understanding that the Government states as a fact that the investigation was begun shortly after November 6th—in any event begun during the November term—— There is no question about that, Mr. Burdell? The indictment so states.

Mr. BURDELL. No; there is no question about that.

The COURT. All right.

55 *Exhibit D to petition*

56

57 *Exhibit E to petition*

In the Southern Division of the United States District Court, in and for the Northern District of California

Before Hon. MICHAEL J. ROCHE, Judge

No. 27257–R

UNITED STATES OF AMERICA, PLAINTIFF

v.

EVAPORATED MILK ASSOCIATION, ET AL, DEFENDANTS

Friday, August 22, 1941

Counsel Appearing: For the United States: Charles S. Burdell, Esq., Special Attorney. M. S. Huberman, Esq., Special Assistant to the Attorney General. For the Defendants: Eugene M. Prince, Esq., Arthur B. Dunne, Esq., Walter H. Olds, Esq.

Mr. BURDELL. In this case, your Honor, might I say one or two words before the actual argument on the motions commences? At the time that the Government was required to comply with the motion for disclosure, one of the demands that the Government was compelled to comply with was a de-
58 mand for the date of the commencement of the investigation which resulted in the return of the indictment. The Government was required to make that disclosure in open court without access to records, and the best it was able to do was to state that the investigation began during the November, 1940 term. At that time it was thought that the disclosure was suf-

ficient and satisfactory. However, as a result of subsequent motions that have been filed it appears that the actual date of the commencemenet of the investigation is very material. I would like, therefore, permission to comply more completely with the demand in the motion for disclosure, and now state for the record the exact date of the commencement of the investigation.

* * * * *

Mr. BURDELL. * * * Now, there is some suggestion that we are changing the facts here at this late date after the plea has been entered. That is not true, at all. We were required to make the disclosure. We made the disclosure as best we could from the facts available here in open court, and at that time, not knowing what motions were going to be filed, I was not anticipating then, as I was a few moments ago; not knowing what motions were going to be filed, we thought that was a satisfactory disclosure. Now, if that was not satisfactory, if counsel are going to assume that matters relating to this indictment were presented every single day from November to
58 May—this seems to me to be a ridiculous assumption—if they are going to assume that as a basis for their plea, it seems to me that they cannot complain when I come in here, after I find out what they are doing, and simply attempt to set them right on the matter.

The COURT. Very well, proceed to do so.

Mr. BURDELL. The investigation commenced on or about February 28th.

The COURT. That is your statement. You will have to develop that fact, whatever the fact may be.

Mr. BURDELL. Do I understand——

The COURT. Unless they accept a stipulation from you you will have to prove it.

Mr. BURDELL. I thought they would, your Honor.

The COURT. Possibly I am partly responsible for this situation. I was attempting to have disclosed what the record disclosed at that time, and then you, gentlemen, between yourselves, in the interest of time, made some stipulation; if there is any question about it, whatever the factual situation, that must be developed.

Mr. BURDELL. I had every confidence that if I said that I had engaged in the presentation of this matter to the grand jury and stated a certain date counsel would take my word for it.

The COURT. Were you the one that presented it?

60 Mr. BURDELL. Yes.

The COURT. Was there anyone presented any testimony to the grand jury in this case before you did, do you know?

Mr. BURDELL. I was present at every grand jury session, your Honor, when matters relating to this indictment were presented.

The COURT. What was the first date that any testimony was taken before the grand jury, if you know?

Mr. BURDELL. February 28, 1941.

* * * * * *

Mr. BURDELL. * * * Now, if the Court please, as I understand the situation, and as I said this morning, the investigation began on or about February 28th. I think at one time I said it began February 28th. I think at another time I said it began on or about February 28th. At that time it was my understanding that the investigation began February 28th. That is my interpretation of the word "begun."

Now, by order of your Honor——

Mr. DUNNE. Would you give us a date, because "on or about February 28th" would indicate that it might not have been until March 1st.

Mr. BURDELL. That is just what I am about to do. By order of your Honor I was able to get the grand jury minutes at recess. Now, on February 28th—now, I have before me the minutes of the grand jury dated February 28th. In
61 these minutes the following recitation appears:

"Minutes of the previous meeting read and approved, as corrected (see below)." Then below it says:

"The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun."

These refer back to the February 27 minutes, so, as I understand these minutes of the grand jury the investigation was begun on February 27. Would the Court like to see these minutes? I will be glad to hand them to your Honor.

The COURT. I am not interested in them.

Mr. BURDELL. Might they be made part of the record, your Honor?

The COURT. Very well.

Mr. BURDELL. Might we make just the minutes of February 27 and 28 a part of the record, your Honor? I see no reason for disclosing any others.

The COURT. That would be better.

Mr. BURDELL. I will now read in the minutes of the grand jury dated February 28, 1941:

"Special meeting of the Federal Grand Jury held this
62 day, Foreman Mrs. Hattie Sloss, presiding. Minutes of previous meeting read and approved as corrected (see below). Special Assistant to the Attorney General Charles C.

Pearce and Special Assistant Charles S. Burdell continued the presentation of the investigation of the peach industry for violation of the Sherman Anti-Trust Act. There being no further business the meeting adjourned." Signed, I think it is, "C. N. Alexander, Secretary," and "Approved Eva L. Gibson, Foreman, pro tem."

Then below the following appears:

"The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun. Other industries named as subject to investigation are Salmon Industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland. Asparagus and Cherries."

Mr. PRINCE. Does that record show the time and place of the meeting?

Mr. BURDELL. No.

Mr. PRINCE. Did you read the whole thing?

Mr. BURDELL. I read the whole thing.

63 *Exhibit F to petition*

Receipt of a copy of the within Plea is hereby admitted this 29 day of August 1941. Charles S. Burdell, Attorney for United States of America. Arthur B. Dunne, 333 Montgomery Street, San Francisco, California, Telephone: YUkon 1977, Attorney for Defendant Carnation Company. Original filed Aug. 29, 1941, with Clerk, U. S. Dist. Court, San Francisco.

In the District Court of the United States of America, in and for the Northern District of California, Southern Division

March Term, 1941

No. 27,257-R

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EVAPORATED MILK ASSOCIATION, ET AL., DEFENDANTS

PLEA ON BEHALF OF CARNATION COMPANY

Comes now Carnation Company, one of the defendants in the above-entitled cause, and as and for a plea to the indict-
64 ment herein and [illegible] a count thereof, shows as follows:

1. The Grand Jury which returned the indictment herein was originally summoned for the November 1940 Term of this court. Said term expired at midnight on March 2, 1941.

2. On February 25, 1941, the United States Attorney for the Northern District of California, and Tom C. Clark and Charles C. Pearce, Special Assistants to the Attorney General, made their petition in the above-entitled court wherein and whereby they represented "that certain investigations had been begun by the November 1940 Term Grand Jury for the Northern District of California, Southern Division, which have not been finished and can not be finished within said term" and wherein they "request that an order be entered by this court authorizing the said November 1940 Term Grand Jury to continue to sit during the term succeeding the November 1940 Term, to-wit, the March 1941 Term, solely to finish said investigations begun but not finished by the said November 1940 Term Grand Jury." Said petition was filed in the office of the clerk of the above-entitled court on or before February 28, 1941, and was by said clerk endorsed as filed February 28, 1941.

3. On February 26, 1941, and in the above-entitled court, before Honorable A. F. St. Sure, a judge thereof, and in open court, the following proceedings were had:

The said November 1940 Term Grand Jury appeared in open court and 20 of said Grand Jurors were present and answered their names. Robert M. McMillan, Assistant United States Attorney, and Charles C. Pearce, Special Assistant to the Attorney General were present for and on behalf of the United States. The court advised the said Grand Jury that the United States Attorney and the Special Assistant to the Attorney General had made a joint application to the court for an order extending the existence of the Grand Jury into the March 1940 Term of the above-entitled court, solely for the purpose of completing certain investigations begun but not yet finished and that the court would enter an order on February 28, 1941, authorizing said Grand Jury to continue its sitting during the succeeding March, 1941 Term of this court, solely to finish investigations begun but not yet finished by said Grand Jury. The foreman of the Grand Jury informed the court that one of the Grand Jurors had died and that certain other Grand Jurors desired to be excused from further service. Three of the Grand Jurors then presented reasons why they should be excused, and the court advised said Grand Jurors that good and sufficient cause having been shown by them, the court would, on March 4, 1941, at 2:00 o'clock P. M. enter a formal order excusing them from further service on said panel, and at said time would also enter an order providing that another Grand Juror would be

excused due to illness. And the court then ordered that a venire issue for 20 persons to serve as Grand Jurors in the place and stead of the deceased Grand Juror and the Grand Jurors who had been excused, said venire to be returnable on Tuesday,
66 March 4, 1941, before the above-entitled court. Thereupon 20 names were drawn and it was ordered that the United States Marshal make service of said writ by personal service.

4. On February 28, 1941, and as the first business of the session of said court on said day and at 10:00 o'clock A. M. on said day, the above-entitled court, Honorable A. F. St. Sure, a judge thereof, presiding, made its order "that the present November 1940 Term Grand Jury now sitting in this division and district be and it is hereby authorized to continue to sit during the March 1941 Term of this court for the sole purpose of finishing investigations begun but not finished by it during said November 1940 Term of said court, in accordance with the signed order this day filed." Upon said day the said court duly rendered, made, signed, and filed its written order entitled in the above-entitled court, entitled as to the matter dealt with "In re: November Term, A. D. 1940 Grand Jury", wherein and whereby it was stated that "this matter coming on to be heard on the petition of Frank J. Hennessy, United States Attorney for the Northern District of California, Tom C. Clark and Charles C. Pearce, Special Assistants to the Attorney General, for an order authorizing the November 1940 Term Grand Jury for the Northern District of California, Southern Division, to continue to sit during the March 1941 Term for the sole purpose of finishing certain investigations undertaken during the November 1940 Term which have not been and cannot be finished by said Grand Jury
67 within said November 1940 Term, and it appearing to the court that said investigations begun by said Grand Jury within said November 1940 Term have not been and cannot be finished within said term; it is therefore ordered that the November 1940 Term Grand Jury now sitting in this division and district be, and it is hereby authorized to continue to sit during the March 1941 Term of this court for the sole purpose of finishing said investigation begun but not finished by it during the November 1940 Term of this court."

5. In pursuance of the said order for a venire, hereinbefore referred to, the United States Marshal personally served said writ on the following five persons, who were among said 20 persons ordered summoned, said service being made upon the dates set opposite the names of said persons, to wit: Mary J. Ball, February 27, 1941; Barry W. Boland, March 1, 1941; Frances M. Bowes, February 27, 1941; Pearl Klein, February 28, 1941; Gerald F. Herrmann, February 28, 1941. None of said five persons was

served with any other or different process relating to said Grand Jury other than as aforesaid. None of said five named persons had in any way participated in any proceedings of said November 1940 Term Grand Jury, nor had they been members thereof at any time prior to the expiration of said November 1940
68 Term. Said five named persons are hereinafter referred to as the "five new Grand Jurors."

On March 4, 1941, at 2:00 o'clock p. m. on said day, and in the above-entitled court, the members of the said November 1940 Term Grand Jury convened before the Honorable A. F. St. Sure, District Judge, and the court then and there having received the return of the United States Marshal and there being eighteen of said members of said November 1940 Term Grand Jury present, the court ordered that members of said November 1940 Term Grand Jury, Lasher, Davis, Heyman, and Griffith be excused and said five new Grand Jurors were then selected, sworn, and impaneled, as substitute Grand Jurors and thereafter they purported to participate in the hearings and deliberations of said Grand Jury and voted on the indictment in the above-entitled matter, on May 29, 1941, as hereinafter more fully appears. In said proceedings on March 4, 1941, and after the impanelment of said five new Grand Jurors, the court stated to the Grand Jury, eighteen members thereof and said five new members being present, that in order that the said new members of the Grand Jury might become fully acquainted with those matters which had been begun but not yet finished by said Grand Jury, that it would be well for said Grand Jury to bring to the attention of the new members of said Grand Jury all those matters which had been brought to the attention of the previous panel, and which they had already undertaken to investigate, but which were not yet finished.

69 6. Thereafter, said eighteen members of said Grand Jury and said five new members convened and purported to act as a Grand Jury and on May 29, 1941, voted the indictment in the above-entitled matter. Of said persons, at said time and on said occasion, two were absent and only twenty-one were present. Of said twenty-one persons present, only eighteen voted for said indictment. No other or different vote on said indictment has since been taken. Said two persons who were absent and who did not vote were not among the said five new Grand Jurors. Without other or different vote the said indictment herein was returned on June 3, 1941.

7. Not counting said five new Grand Jurors, there were less than sixteen persons present as Grand Jurors at eleven sessions of said Grand Jury between March 4, 1941 and May 29, 1941 and not counting said five new Grand Jurors, there were only fifteen

such persons present as Grand Jurors at seven of said sessions, only fourteen present at three of said sessions, and only twelve present at one of said sessions. Only five of said members were present at every session of said Grand Jury from and including February 28, 1941 to and including May 29, 1941. During all of the proceedings of said Grand Jury, less than 12 of said 18 Grand Jurors who voted for said indictment were not absent a substantial number of said sessions. The number of said Grand Jurors with the number of sessions they were absent prior to May 29, 1941 is as follows:

Number of jurors	Sessions absent	Approximate percentage of sessions absent	Number of jurors	Sessions absent	Approximate percentage of sessions absent
1	24	48	1	9	18
2	23	46	1	7	14
2	22	44	1	6	12
1	16	32	1	3	6
1	11	22	3	1	2

From and including March 4, 1941, of the twenty-one persons present on May 29, 1941, when said indictment was voted, six had been absent from the sessions of said Grand Jury once, one twice, two three times, two five times, and one six times, and of these, two of those absent once were two of the said five new Grand Jurors and the one absent twice was one of said five new Grand Jurors.

8. This defendant did not employ counsel in the above-entitled matter until Friday, August 15, 1941, when it employed the counsel who has appeared for it herein, and thereafter first learned of the matters herein set out and of the absences of said Grand Jurors and of the numerical vote for said indictment. Said facts
71 were first disclosed herein on August 6, 1941, and this defendant could not have ascertained any of the facts in respect of the said vote and absences prior to said time, all as appears from the records herein. This defendant refers to and herein incorporates by reference all of the records and files of the court in respect of this cause and in respect of said Grand Jury and its proceedings, including, without limitations, the minutes of this court and the reporter's transcript of the proceedings in open court herein.

9. The investigation of the charges made in each of the counts in the indictment herein, of the connection of each of the defendants with the matters referred to in the indictment herein, and of the connection, if any, of this defendant, with the matters referred to in the indictment herein was begun by the said November 1940 Term Grand Jury in the said November 1940 Term and shortly after November 6, 1940, and substantial evidence in

respect thereof was presented to said Grand Jury prior to February 28, 1941, and prior to March 4, 1941.

As and for a Second, Separate, and Distinct Plea to the indictment herein, and each count thereof, this defendant shows as follows:

1. Herein incorporates by reference as fully as though herein set forth at length the statements and allegations contained in paragraphs 1, 2, 3, 4, 5, 8, and 9 of the First Plea herein above.

And for a Third, Separate, and Distinct Plea to the
72 indictment herein, and each count thereof, this defendant shows as follows:

1. Herein incorporates by reference as fully as though herein set forth at length, the statements and allegations contained in paragraphs 1, 2, 3, 4, 5, 7, 8, and 9 of the First Plea hereinabove.

And for a Fourth, Separate, and Distinct Plea to the indictment herein, and each count thereof, this defendant shows as follows:

1. Incorporates herein by reference as fully as though herein set forth at length, the statements and allegations contained in paragraphs 1, 2, 3, and 4 of the First Plea hereinabove.

2. In pursuance of said order for a venire hereinbefore referred to, the United States Marshal personally served said writ and made return, and thereafter, from the persons so served, and on March 4, 1941, the above-entitled court selected five persons who were then and there impaneled and sworn as five new Grand Jurors and as substitute Grand Jurors for said deceased Grand Juror and for four other members of the said November 1940 Term Grand Jury who were then and there and on said day, but prior to the impanelment of said five new Grand Jurors excused from said Grand Jury. Thereafter, the said remaining eighteen members of the November 1940 Term Grand Jury and said
73 five new Grand Jurors purported to act as a Grand Jury and as the November 1940 Term Grand Jury, continued through the March 1941 Term, and so purporting to act, did, on May 29, 1941, vote the indictment herein. Said indictment was returned on June 3, 1941.

3. No investigation of this defendant, or of any defendant named in the indictment herein or of any violation of § 1 or § 3 of the Act of Congress of July 2, 1890, as amended or otherwise (known as the Sherman Antitrust Act), by this defendant or any defendant named in the indictment herein or of any matter referred to in the indictment herein was begun by the said November 1940 Term Grand Jury during the said November 1940 Term or prior to midnight on March 2, 1941.

4. The facts herein alleged in paragraph 3 of this Fourth Plea were first discovered by this defendant on August 22, 1941, when

the same were disclosed in open court to this defendant by the Special Assistant to the Attorney General and by the reading by him of the minutes of the said Grand Jury, all as more particularly appears by the record of the proceedings herein in open court on August 22, 1941, and this defendant could not have ascertained any of said facts in respect of the bringing of said indictment prior to said time, in this, that the proceedings of said Grand Jury were secret and remained secret until disclosed as aforesaid.

5. The indictment herein was not the result of or part of or in any way connected with any investigation begun
74 by said Grand Jury prior to the termination of the November 1940 Term, or contemplated or referred to in the said petition referred to in paragraph 2 of the First Plea hereinabove or in the statement of the court referred to in Paragraph 3 of the First plea hereinabove or in the order of the court referred to in paragraph 4 of the First Plea hereinabove, and the voting and/or return of said indictment was beyond the power and jurisdiction of said Grand Jury and it was beyond the power and jurisdiction of the above-entitled court to receive the same and the same was void and of no effect.

6. This defendant refers to and herein incorporates by reference all of the records and files of the court in respect of this cause and in respect of said Grand Jury and its proceedings, and of said Grand Jury, including, without limitations, the minutes of this court and the reporter's transcript of the proceedings in open court herein.

And for a Fifth, Separate, and Distinct Plea to the indictment herein, and each count thereof, this defendant shows as follows:

1. Incorporates herein by reference as fully as though herein set forth at length, the statements and allegations contained in paragraphs 1, 2, 3, and 4 of the First Plea herein above and the statements and allegations of paragraph 2 and 6 of the Fourth Plea herein above.

75 2. No investigation of this defendant, or of any defendant named in the indictment herein, or of any violation of § 1 or § 3 of the Act of Congress of July 2, 1890, as amended or otherwise (known as the Sherman Anti-Trust Act) by this defendant or any defendant named in the indictment herein, or of any matter referred to in the indictment herein or culminating in the indictment was begun by the said November 1940 Term Grand Jury prior to February 27, 1941, and the indictment herein was not the result of, or part of, or in anywise connected with any investigation begun before February 27, 1941, or any investigation contemplated by or referred to in said petition referred to in paragraph 2 of the First Plea herein above or in the statement of

the court referred to in paragraph 3 of the First Plea herein above or in the order of the court referred to in paragraph 4 of the First Plea herein above, and the voting and/or return of said indictment was beyond the power and jurisdiction of said Grand Jury and it was beyond the power and jurisdiction of the above-entitled court to receive the same and the same was and is void and of no effect.

Wherefore, this defendant prays that said indictment be quashed and dismissed and that it be discharged thereof without day.

ARTHUR B. DUNNE,
Attorney for Defendant, Carnation Company.

76 STATE OF CALIFORNIA,
City and County of San Francisco, and in the Above District and Division, ss:

Arthur B. Dunne, being first duly sworn, deposes and says:

I am an attorney at law, licensed to practice in all of the courts of the State of California, and in the United States District Court in and for the Northern District of California. I make this verification for and on behalf of defendant Carnation Company for the reason that said defendant has no officers within the above state and district and it would be impossible for it or any of its officers to acquire knowledge of the matters stated in the foregoing pleas within the time required by law for the making of the foregoing pleas, and that the said defendant is absent from the state, district, and county where I have my office, to wit, the City and County of San Francisco, State of California, and has no officer in said state, district, and county, and for the reason that I have knowledge of the matters referred to in the foregoing pleas by reason of examination of the records herein and disclosures made in open court. I have read the foregoing pleas and know the contents thereof and the same are true to
77 the best of my knowledge, information and belief, based on an examination of the records herein and incorporated in the foregoing pleas and on disclosures made by the United States of America, through its attorneys, in open court, and in this respect, I make this verification as to the matters alleged in paragraph 9 of the First Plea based upon the recitals of the indictment herein, the application referred to and quoted in paragraph 2 of the First Plea herein, the matters referred to in paragraph 3 of the First Plea herein and the matters set out in paragraph 4 of the First Plea herein, which appear of record in the above-entitled cause, and upon the acquiescence of the attorneys for the United States of America in open court and on proceedings in

respect of the order of the above-entitled court granting the motion of certain defendants herein for a disclosure when in response to the question and statement as follows by one of the attorneys for some of the defendants herein, "It is my understanding that the Government states as a fact that the investigation was begun shortly after November 6th—in any event begun during the November Term—There is no question about that, Mr. Burdell? The indictment so states." Mr. Burdell, one of the attorneys for the United States of America herein replied: "No, there is no question about that," and in respect of the allegations of paragraphs 3, 4, and 5 of the fourth of the foregoing pleas, and of paragraph 2 of the fifth of the foregoing pleas, upon
78 the following facts and circumstances: On August 22, 1941, the defendants who had theretofore been arraigned herein and this defendant appeared in the above-entitled court by their counsel upon the hearing of demurrers to certain pleas and on the hearing of certain motions. At that time said Burdell, as attorney for the United States of America stated in substance that he had been mistaken in theretofore stating on August 6, 1941 that the investigation leading to the indictment herein had been commenced in November 1940, that the minutes of the Grand Jury showed otherwise and that said investigation was not begun until the 27th day or the 28th day of February, 1941, and that the minutes of the November 1940 Term Grand Jury, dated February 28, 1941, showed as follows: "Special Meeting of the Federal Grand Jury held this day, Foreman: Mrs. Hattie H. Sloss, Presiding. Minutes of previous meeting read and approved as corrected. (see below) Special Assistant to the Attorney General Charles C. Pearce and Special Assistant Charles S. Burdell continued the presentation of the investigation of the peach industry for violation of the Sherman Anti-Trust Act. There being no further business the meeting adjourned.", and then the matter referred to in said minutes below the minutes was by said Burdell read as follows: "The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Indus-
79 try; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun. Other industries named as subject to investigation are Salmon industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland, Asparagus and Cherries." At said time and on said occasion, said Burdell stated and it appears from the records of the meetings of said November 1940 Term Grand Jury

that the meeting of said Grand Jury next preceding the meeting of February 28, 1941 was on February 27, 1941. I have no information in respect of the proceedings of said Grand Jury except as disclosed, as hereinabove appears, and said disclosures being inconsistent, the substance of said disclosures has been set out in the foregoing plea in separate pleas and this verification made accordingly.

ARTHUR B. DUNNE.

Subscribed and sworn to before me this 29th day of August 1941.

[SEAL] KATHRYN E. STONE.
Notary Public,
In and for the City and County of
San Francisco, State of California.

80 *Exhibit G to Petition*

Original filed Sept. 13, 1941, with Clerk, U. S. Dist. Court, San Francisco. Receipt of a copy of the within plea is hereby admitted this 13th day of September, 1941. Alfred M. Agressi, Attorney for U. S.

In the District Court of the United States for the Northern District of California, Southern Division

March Term 1941

No. 27257-R

UNITED STATES OF AMERICA,

vs.

EVAPORATED MILK ASSOCIATION, ET AL.

PLEA ON BEHALF OF CERTAIN DEFENDANTS

81 Each of the defendants herein who has heretofore appeared in the above entitled cause, except Carnation Company, a corporation, and including, without limitation, each and every defendant, except said Carnation Company, who was present in court herein or by attorney on August 6, 1941, severally and separately, and as and for a first plea to the indictment herein, and each count thereof, alleges as follows:

1. The grand jury which returned the indictment herein was summoned and impaneled for the November 1940 term of this court, which term expired at midnight on March 2, 1941.

2. On February 28, 1941, said grand jury was continued in existence by order of the above entitled court and authorized to

continue to sit during the March 1941 term for the sole purpose of finishing certain investigations begun but not finished by it during the November 1940 term of this court.

3. On August 22, 1941, counsel for the United States herein read into the record, and these defendants for the first time obtained knowledge of, the minutes of said grand jury for February 28, 1941, as follows:

"Mr. BURDELL. I will now read in the minutes of the grand jury dated February 28, 1941:

"'Special meeting of the Federal Grand Jury held this day, Foreman Mrs. Hattie H. Sloss, presiding. Minutes of previous meeting read and approved as corrected. (See below.) Special Assistant to the Attorney General Charles C. Pearce and
82 Special Assistant Charles S. Burdell continued the presentation of the investigation of the peach industry for violation of the Sherman Anti-Trust Act. There being no further business the meeting adjourned.' Signed, I think it is, 'C. N. Alexander, Secretary,' and 'Approved Eva L. Gibson, Foreman, pro tem.'"

Then below the following appears:

"The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun. Other industries named as subject to investigation are Salmon industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland. Asparagus and Cherries." (Rep. Tr. 33–34.)

4. The "previous meeting" referred to in said minutes was the meeting of February 27, 1941. The statement in said minutes, "investigation begun," with reference to the canned and evaporated milk industry is a conclusion of law, not supported by the facts stated in said minutes. Said minutes show, and on the basis
83 thereof said defendants allege, that no investigation of any matter mentioned in said indictment and no investigation of any defendant joining in this plea was "begun," within the meaning of the Act of April 17, 1940 (U. S. C. 28:421), on February 27, 1941, or at any other time during the said November 1940 term.

5. This court was without jurisdiction to continue said grand jury to sit during said March 1941 term to investigate any matters mentioned in said indictment or any defendant joining in this plea.

For a second, separate, and distinct plea to the indictment herein, and to each count thereof, said of said defendants, severally and separately, alleges as follows:

1. Said defendants incorporate herein by reference each and every, all and singular, the allegations of the first plea herein.

2. Said grand jury was, during the March 1941 term of this court, without jurisdiction or authority to investigate any matters mentioned in said indictment or any defendant joining in this plea and was without authority or jurisdiction to return and file the indictment herein against said defendants, or any of them.

For a third, separate, and distinct plea to the indictment herein, and to each count thereof, each of said defendants, severally and separately, alleges as follows:

84

1. Said defendants incorporate herein by reference each and every, all and singular, the allegations of the first plea herein.

2. This court has no jurisdiction to entertain any proceeding against any of said defendants based on the indictment herein.

For a fourth, separate, and distinct plea to the indictment herein, and to each count thereof, each of said defendants, severally and separately, alleges as follows:

1. Said defendants incorporate herein by reference each and every, all and singular, the allegations of the first plea herein.

2. By written petition executed on and dated February 25, 1941, by Frank J. Hennessy, United States Attorney for the Northern District of California, Tom C. Clark, and Charles C. Pearce, Special Assistants to the Attorney General, and filed February 26, 1941, a copy of which is marked Exhibit "A," attached hereto, and by this reference made a part hereof, said attorneys for the United States "represent[ed] that certain investigations have been begun by the November 1940 Term Grand Jury for the Northern District of California, Southern Division, which have not been finished and cannot be finished within said term," and requested the order of this court authorizing

85

said November 1940 term grand jury to continue to sit during the March 1941 term "solely to finish said investigations begun but not finished by the said November 1940 Term Grand Jury."

3. On February 28, 1941, this court made its order, a copy of which is marked Exhibit "B," attached hereto, and by this reference made a part hereof, granting said petition and authorizing said grand jury "to continue to sit during the March 1941 Term of this Court for the sole purpose of finishing said investigations begun but not finished by it during the November 1940 Term of this Court."

4. No investigation of any matter involved in the indictment herein or of any defendant joining in this plea had been begun

by said grand jury on or before February 26, 1941, and the indictment herein and all matters mentioned in said indictment were and are outside the scope of the said order of this court, Exhibit B.

5. Said grand jury had no jurisdiction to investigate any matter mentioned in said indictment nor any defendant joining in this plea during the March 1941 term of this court and had no jurisdiction to return the indictment herein.

For a fifth, separate, and distinct plea to the indictment herein, and to each count thereof, each of said defendants, severally and separately, alleges as follows:

86 1. Said defendants incorporate herein by reference each and every, all and singular, the allegations of the fourth plea herein.

2. This court has no jurisdiction to entertain any proceeding against any of said defendants based on the indictment herein.

Wherefore, each of said defendants prays judgment of the said indictment that the same be quashed and dismissed and further whether the United States of America ought or can prosecute it or him for the premises, and that it or he be discharged thereof without delay.

Pillsbury, Madison & Sutro—Pillsbury, Madison & Sutro; Eugene M. Prince—Eugene M. Prince; Morrison, Hohfeld, Foerster, Shuman & Clark—Morrison, Hohfeld, Foerster, Shuman & Clark; Herbert W. Clark—Herbert W. Clark; Brobeck, Phleger & Harrison—Brobeck, Phleger & Harrison; Maurice E. Harrison—Maurice E. Harrison; Webb, Webb & Olds—Webb, Webb & Olds; Walter K. Olds—Walter K. Olds; Willis I. Morrison—

87 Willis I. Morrison; Lee M. Olds—Lee M. Olds; Joseph A. Murphy—Joseph A. Murphy; Nat Brown—Nat Brown; J. Wesley Cupp—J. Wesley Cupp; E. R. Hoerchner—E. R. Hoerchner; W. E. Foley—W. E. Foley; James E. Foley—James E. Foley, Attorneys, respectively for Moving Defendants.

88 STATE OF CALIFORNIA,

City and County of San Francisco, ss:

Eugene M. Prince, being first duly sworn, deposes and says: That he is an attorney of record for certain defendants herein; that he has read the foregoing pleas and knows the contents thereof, and the same are true; that his knowledge thereof is derived from the records of the court in this proceeding and upon the papers and files herein, including the reporter's transcript of the proceedings herein on July 21, August 6, August 14, and August 22, 1941; that affiant, being duly authorized, makes this verification on behalf of each and every defendant joining in said

pleas; that said defendants are widely scattered, many of them are nonresidents of California, and it would be impossible for all of said defendants to obtain personal knowledge of the facts therein stated within a reasonable time for the making of the foregoing pleas.

EUGENE M. PRINCE.

Subscribed and sworn to before me this 12th day of September 1941.

[SEAL] CHALMER MUNDAY,
Notary Public,
in and for the City and County of
San Francisco, State of California.

89 *Exhibit A to Exhibit G to petition*

In the District Court of the United States of America for the Northern District of California, Southern Division

In re November Term, A. D. 1940 Grand Jury

PETITION

Now come Frank J. Hennessy, United States Attorney for the Northern District of California, Tom C. Clark and Charles C. Pearce, Special Assistants to the Attorney General, and represent that certain investigations have been begun by the November 1940 Term Grand Jury for the Northern District of California, Southern Division, which have not been finished and can not be finished within said term.

It is therefore respectfully requested that an order be entered by this Court authorizing the said November 1940 Term Grand Jury to continue to sit during the term succeeding the said November 1940 Term, to-wit: the March 1941 Terms, solely to finish said investigations begun but not finished by the said November 1940 Term Grand Jury.

FRANK J. HENNESSY,
Frank J. Hennessy,
United States Attorney for the
Northern District of California.
TOM C. CLARK,
Tom C. Clark,
CHARLES C. PEARCE,
Charles C. Pearce,
Special Assistants to the Attorney General.

Dated at San Francisco, California This 25 day of February 1941.

U. S. Government printing office.
502152—42——4

90 *Exhibit B to exhibit G to petition*

In the District Court of the United States of America for the Northern District of California, Southern Division.

In re November Term, A. D. 1940 Grand Jury

ORDER

This matter coming on to be heard upon the petition of Frank J. Hennessy, United States Attorney for the Northern District of California, Tom C. Clark and Charles C. Pearce, Special Assistants to the Attorney General, for an order authorizing the November 1940 Term Grand Jury for the Northern District of California, Southern Division, to continue to sit during the March 1941 Term for the sole purpose of finishing certain investigations undertaken during the November 1940 Term which have not been and cannot be finished by said Grand Jury within said November 1940 Term, and it appearing to the Court that said investigations begun by said Grand Jury within said November 1940 Term have not and cannot be finished within said Term;

It is therefore ordered, that the November 1940 Term Grand Jury now sitting in this Division and District, be and it is hereby authorized to continue to sit during the March 1941 Term of this Court for the sole purpose of finishing said investigations begun but not finished by it during the November 1940 Term of this Court.

A. F. ST. SURE,
United States District Judge.

Dated at San Francisco, California, this 28th day of February 1941.

U. S. Government printing office.

91 *Exhibit H to petition*

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before Hon. MICHAEL J. ROCHE, Judge

No. 27,257–R

UNITED STATES OF AMERICA
v.
EVAPORATED MILK ASSOCIATION, ET AL, DEFENDANTS

Monday, September 22, 1941

Counsel Appearing:

For the United States: Charles S. Burdell, Esq., Special Attorney, and Fred S. Gilbert, Esq., Special Assistant to the Attorney General.

For Defendants: Arthur B. Dunne, Esq., Herbert W. Clark, Esq., Eugene M. Prince, Esq., Moses Lasky, Esq., Patrick A. Geraghty, Esq.

* * * * *

Mr. DUNNE. * * * Now, the next thing to do will be to set this down for trial, your Honor.

The COURT. On the plea?

Mr. DUNNE. The plea to which a denial has been filed.

Mr. BURDELL. There are two pleas.

92 The COURT. What day?

Mr. DUNNE. Any day.

Mr. BURDELL. We want to get at this as fast as possible. Can it be set for tomorrow?

The COURT. We cannot get a jury in by tomorrow. It will have to go over.

Mr. BURDELL. Couldn't we try it before your Honor without a jury?

Mr. DUNNE. You tell us what happened and I will submit it to his Honor, but if we must go at it blind let us have a jury.

The COURT. Are you entitled to a jury as a matter of right?

Mr. DUNNE. Yes.

The COURT. Are you satisfied he is?

Mr. BURDELL. Yes. I don't know what I can do about it if he insists on a jury. I do not see any reason why it cannot be tried by the Court.

The COURT. He has already stated he has a right and he has asked for it, and it cannot be denied him.

The CLERK. It will have to go over to December 3.

Mr. BURDELL. The law, as I understand it, is that the pleader in such a situation is entitled to a hearing.

The COURT. All right, how am I going to deny it to him then?

Mr. DUNNE. I have made the suggestion to counsel of how he can avoid it.

* * * * *

93 Mr. BURDELL. Might I say one further word, we have just set two pleas in abatement for trial in December. That is a long ways off, and I, personally, would like to get this thing settled prior to that time. I thought that we would settle it to-day on these denials that I have filed, because the pleas were supported by affidavits, and I thought those were the facts upon which counsel were going to rely, so I thought the thing could be settled on those facts. As long as it cannot be settled to-day I do not want it to go over and wait until December, unless it is absolutely necessary. I wonder if I might ask your Honor for permission to withdraw the denials that were filed to-day and file a motion

to strike the pleas. I think a motion to strike the pleas could be argued before your Honor very shortly, whatever date your Honor cares to hear them, to-day or tomorrow, and that will obviate the necessity of calling a jury and putting the thing over until December.

Mr. DUNNE. If your Honor please, that is saying in so many words the investigation was not begun during the November, 1940 term. As your Honor knows, if you overruled any such motion then that would be ordered set down again, and likewise as to the traverse. I think the matter ought to stay just exactly as it is. Let us find out what the facts are and submit it to a fact-finding body, and then we can move on to some other controversy.

94 Mr. BURDELL. I am the one who wants to go along fast. I am willing to take a chance.

The COURT. I am not interested in what anybody wants to take a chance on.

Mr. BURDELL. Maybe I had better explain myself. Mr. Dunne indicated that that might slow things up further. I seem to be the one who is interested in getting the thing would up as quickly as possible, and I say I am willing to submit it to your Honor on a motion to strike the pleas rather than to wait.

The COURT. I have passed on the motions before me. There is nothing before the Court.

Mr. CLARK. Are you through, Mr. Burdell?

Mr. BURDELL. May I request permission to withdraw my general denial and file a motion to strike?

The COURT. He answers that by saying that if the matter that you have in mind is perfectly true he can renew this motion after you get through with it.

Mr. DUNNE. Sure.

Mr. BURDELL. If he says he will do it regardless of that I will go on with the general denial.

* * * * *

The COURT. If I give you a right of way on the calendar am I assured that this matter will go to trial?

Mr. DUNNE. Yes, your Honor. So far as the Carnation
95 Company is concerned I will stipulate now that if on the 3rd of December I should be so engaged that I could not proceed some other counsel representing one of the other defendants may proceed in my behalf.

Mr. FRENCH. That is true, if your Honor please, we will be ready on the 3rd and under no circumstances will any further time be asked.

Mr. BURDELL. I will go ahead, I will be here.

The COURT. Set it down for the 3rd of December.

96 *Exhibit 1 to petition*

In the District Court of the United States for the Northern District of California, Southern Division

No. 27257–R

UNITED STATES OF AMERICA

v.

EVAPORATED MILK ASSOCIATION, ET AL.

REPLICATION

Now comes the United States of America and denies generally each and every material allegation contained in the pleas heretofore filed in the above-entitled case, which said pleas are included in the pleading entitled "Plea on behalf of certain defendants."

TOM C. CLARK,
Tom C. Clark,
WALLACE HOWLAND,
Wallace Howland,
Special Assistants to the Attorney General.
CHARLES S. BURDELL,
Charles S. Burdell,
FRED S. GILBERT, JR.,
Special Attorneys.

THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.
FRANK J. HENNESSY,
Frank J. Hennessy,
United States Attorney.

97 In the District Court of the United States for the Northern District of California, Southern Division

No. 27257–R

UNITED STATES OF AMERICA

v.

EVAPORATED MILK ASSOCIATION, ET AL.

REPLICATION

Now comes the United States of America and denies generally each and every material allegation contained in the pleas here-

tofore filed in the above-entitled case, which said pleas are included in the pleading entitled "Plea on behalf of Carnation Company."

TOM C. CLARK,
Tom C. Clark,
WALLACE HOWLAND,
Wallace Howland,
Special Assistants to the Attorney General.
CHARLES S. BURDELL,
Charles S. Burdell,
FRED S. GILBERT, JR.,
Special Attorneys.

THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.
FRANK J. HENNESSY,
Frank J. Hennessy,
United States Attorney.

98 *Exhibit J to petition*

In the District Court of the United States of America for the Northern District of California, Southern Division

No. 27257-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

EVAPORATED MILK ASSOCIATION, ET AL., DEFENDANTS

NOTICE OF MOTION FOR LEAVE TO WITHDRAW REPLICATIONS AND TO FILE MOTIONS TO STRIKE AND DEMURRERS TO CERTAIN PLEAS IN ABATEMENT

To:

MESSRS. PILLSBURY, MADISON & SUTRO,
EUGENE M. PRINCE, Esq.,
225 Bush Street, San Francisco, California.

99 MESSRS. MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
HERBERT W. CLARK, *Esq.*,
Crocker Building, San Francisco, California.

MESSRS. BROBECK, PHLEGER & HARRISON,
MAURICE E. HARRISON, Esq.,
111 Sutter Street, San Francisco, California.

ARTHUR B. DUNNE, Esq.,
233 Montgomery Street, San Francisco, California.
WEBB, WEBB & OLDS,
WALTER K. OLDS, Esq.,
Mills Tower, San Francisco, California.
LEE M. OLDS, Esq.,
57 Post Street, San Francisco, California.
WILLIS I. MORRISON, Esq.,
215 West Fifth Street, Los Angeles, California.
JOSEPH A. MURPHY, Esq.,
Latham Square Building, Oakland, California.
W. E. FOLEY, Esq.,
JAMES W. FOLEY, Esq.
2090 The Alameda, San Jose, California.
J. WESLEY CUPP, Esq.,
Black Building, Los Angeles, California.
E. R. HOERCHNER, Esq.
Phelan Building, San Francisco, California.
NAT BROWN, Esq.,
Bank of America Building Stockton, California.

100 Please take notice that on Monday, December 15, 1941, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, and at the courtroom of the Honorable Michael J. Roche, United States District Judge, Post Office Building, San Francisco, California, the United States of America will move the Court for leave to withdraw its replications filed herein on August 22, 1941, and to file in their stead motions to strike the following pleas in abatement, hereinbefore filed by certain defendants, to wit:

The First, Second, Third, Fourth, and Fifth Pleas and each of them, contained in the pleading entitled "Pleas on behalf of certain defendants" filed herein on September 13, 1941, by Messrs. Pillsbury, Madison & Sutro, and associated counsel.

The Fourth Plea and the Fifth Plea, and each of them, contained in a pleading entitled "Plea on behalf of Carnation Company," filed herein on August 29, 1941, by Arthur B. Dunne, Esquire.

The motions to strike are to be made on the following grounds, severally and collectively, against each and every one of the aforesaid pleas in abatement, each of said grounds being hereby specified as a ground for each of said motions to strike against said pleas in abatement, to wit:

1. The said pleas in abatement, and each of them, do not state specific facts with sufficient certainty, accuracy and completeness to constitute valid pleas in abatement.

101 2. The said pleas, and each of them, allege on knowledge, or on information or belief, facts which the Court will take judicial notice the pleaders cannot know of their own knowledge.

3. The said pleas, and each of them, are not well taken under the law was made and provided in such cases.

Said motions to strike will be based upon the aforesaid pleas in abatement, including the several and respective allegations and the matters referred to therein of which the Court has judicial knowledge and notice.

In the event of denial of said motions to strike, or any of them, the United States of America will respectfully request leave to plead over to such merits as the pleas in abatement, and each of them, may be determined to have.

Please take notice, likewise, that on Monday, December 15, 1941, at the time and at the place aforesaid, the United States of America will also move the Court for leave to withdraw its replications filed herein on August 22, 1941, and to file in their stead demurrers to the following pleas in abatement, hereinbefore filed by a certain defendant, to wit:

The First Plea, the Second Plea, and the Third Plea, and each of them, contained in the pleading entitled "Plea on behalf of Carnation Company," filed herein on August 29, 1941, by Arthur B. Dunne, Esquire.

102 The said demurrers will be made on the following grounds, against each and every one of the aforesaid pleas in abatement, the said grounds being specified hereby as applicable to each demurrer to said pleas in abatement, to wit:

1. The said pleas in abatement, and each of them, do not state facts sufficient to constitute a valid plea in abatement.

2. The said pleas in abatement, and each of them, are vague, indefinite and uncertain to such an extent that the Government is not advised of the precise legal basis upon which said pleas are grounded.

Said demurrers will be directed to the aforesaid pleas in abatement, including their several and respective allegations and the matters referred to therein, of which the Court has judicial knowledge and notice.

In the event of overruling of said demurrers, or any of them, the United States of America will respectfully request leave to

ROLL CALL

FEDERAL GRAND JURY

NOVEMBER 1940 TERM

	MARCH, 1941	APRIL, 1941	May-1941
ALLER, Miss Rose	✓	✓	✓
ALEXANDER, Claude J.	✓	✓	✓
BAER, Mrs. Florence	✓	✓	✓
BALD, MARY J. Mrs.	a	✓	✓
BINE, Mrs. Alma E.	✓	✓	✓
BOLAND, Barry W.	✓	✓	✓
BOWES, Mrs. Frances M.	a	✓	✓
CLOW, Elmer E.	✓	✓	✓
CRAVEN, Mrs. J. C.	✓	aa	aa
FRIEDLICH, Mrs. Rose	✓	✓	✓
GABRINI, Wm. P.	✓	a	✓
GALLIS, C.	✓	a	✓
GERMAIN, Geo. De St.	✓	✓	✓
GIBSON, Mrs. Eva G.	✓	✓	✓
GREENBERG, Mrs. Louise B.	✓	✓	✓
HERRMANN, Gerald F.	✓	✓	✓
KLEIN, Pearl Miss	✓	a	✓

ALLEN, Miss Rose

ALEXANDER, Claude L.

BAER, Mrs. Florence

HALL, MARY J. Mrs.

HINE, Mrs. Alma E.

HOLAND, Barry W.

HOWES, Mrs. Frances M.

CLOW, Elmer E.

CRAVEN, Mrs. J. C.

[illegible], Mrs. Rose

GABRIEL, Wm. F.

GALLUS, C.

GERMAIN, Geo. De St.

GIBSON, Mrs. Eva G.

GREENBERG, Mrs. Louise P.

HERRMANN, Gerald F.

KLEIN, Pearl Mrs

MOSKOWITZ, Maurice

McCANN, John P.

McCOY, Wm. M.

SLOSS, Mrs. Hattie

SMITH, Court

WILKERSON, James W. Berkeley

MRS. EVA GIBSON, Foreman Pro Tem

Claude Alexander Secretary

ROLL CALL

FEDERAL GRAND JURY

NOVEMBER 1940 TERM

	1940 NOVEMBER	DECEMBER	1941 JANUARY	FEBRUARY	
	6 13 20 27	4 11 18 28	8 15 22 29	5 12 19 26	
ADLER, Miss Rose	✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ ✓ Ab	✓ ✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ ✓ ✓	40 32
ALEXANDER, Claude H	✓ ✓ a	a a a a a a a	a a a ✓	✓ ✓ ✓ ✓ ✓	24 16
BAKER, Mrs Florence	✓ ✓ ✓	✓ ✓ ✓ ✓ ✓ ✓	✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ ✓	40 32
BLAU, Mrs Alma K	✓ ✓ ✓	✓ ✓ ✓ ✓ ✓ ✓	✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ ✓	40 32
CLOW, Elmer E	✓ ✓ ✓	✓ ✓ ✓ ✓ ✓ ✓	✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ ✓	40 32
CRAVEN, Mrs J C	✓ ✓ ✓	✓ ✓ ✓ ✓ ✓ ✓	✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ ✓	40 32
~~DAVIS, Hugh L Hillbrae~~	✓ ✓ ✓	✓ ✓ ✓ ✓ ✓ a	✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ a Excused	47 43
FREDRICK, Mrs Rose	✓ ✓ ✓	✓ ✓ ✓ ✓ ✓ ✓	✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ ✓	40 32
GABRIEL, Wm F	✓ ✓ ✓	✓ ✓ ✓ ✓ ✓ Ab	✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ ✓	40 32
GALLIS, G	✓ ✓ a	✓ ✓ a a a ✓	a a ✓ ✓	✓ ✓ ✓ ✓ ✓	32 24
GERMAIN, Geo De St	✓ ✓ ✓	✓ ✓ ✓ ✓ ✓ ✓	✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ ✓	40 32
GIBSON, Mrs Eva G	✓ ✓ ✓	✓ ✓ ✓ ✓ ✓ ✓	✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ ✓	40 32
GREENBERG, Mrs Louise B	✓ ✓ ✓	✓ ✓ ✓ ✓ ✓ ✓	✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ ✓	40 32
~~GRIFFITH, Ralph H Berkeley~~	a a a sick in hospital	a a a a a a	a a a a a	a a a a a Excused	40 32
~~HENDEL, Stanley G~~	✓ ✓ a Excused	a a a a ✓ a	a a a ✓	a a a a a Excused	40 32

ADLER, Miss Rose

ALEXANDER, Claude H

BAER, Mrs Florence

BLEE, Mrs Alma K

CLOW, Elmer E

CRAVEN, Mrs J C

~~DAVIS, Hugh L Millbrae~~

FREDRICK, Mrs Rose

GABRIEL, Wm F

GALLIS, G

GERMAIN, Geo De St

GIBSON, Mrs Eva C

GREENBERG, Mrs Louise B

~~GRIMMICK, Ralph H Berkeley~~

~~HERMAN, Stanley G~~

~~KNIGHT, Walter B San Mateo~~

~~LASHER, Clinton D Oakland~~

MOSKOWITZ, Maurice

McCANN, John F

McCOY, Wm M

SLOSS, Mrs Hattie

SMITH, Court

WILKERSON, James W Berkeley

Hermann Grace F.

Ball Mary J

Bowers, Frances M Mrs

Klein Pearl

Hattie

MRS. M. C. SLOSS, Foreman

MR. CLAUDE H ALEXANDER, Secretary

Roland Borrow

plead over to such merits as the said pleas in abatement, and each of them, may be determined to have.

TOM C. CLARK,
Tom C. Clark,
WALLACE HOWLAND,
Wallace Howland,
Special Assistants to the Attorney General.

FRED S. GILBERT, JR.,
Fred S. Gilbert, Jr.,
JOSEPH L. ALIOTO,
Joseph L. Alioto,
Special Attorneys.

THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.
FRANK J. HENNESSY,
Frank J. Hennessy,
United States Attorney.

[Endorsed:] Filed Jan. 28, 1942. Paul P. O'Brien, Clerk.

103 In United States Circuit Court of Appeals for the Ninth Circuit

Order to show cause

Jan. 28, 1942

Upon reading and filing the verified petition of the above-named petitioners praying for a writ of mandamus or other appropriate writ against the Honorable Michael J. Roche, Judge of the United States District Court for the Northern District of California, Southern Division and The United States District Court for the Northern District of California, Southern Division, and good cause therefor appearing,

It is hereby ordered that said respondents show cause before this Court on Monday, the ninth day of February, 1942, at the hour of 10:00 o'clock a. m. in the courtroom of this court in San Francisco, California, why a peremptory writ of mandamus or other appropriate writ should not issue; and

It is further ordered that a copy of said petition and a copy of this order be forthwith served upon said Honorable Michael J. Roche.

104 RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA, *ss:*

I hereby certify and return that I served the annexed order to show cause on the therein-named Honorable Michael J. Roche, Judge of the United States District Court together with a copy of a Petition for said Order by handing to and leaving a true and correct copy thereof with the Honorable Michael J. Roche personally at San Francisco, California in said District on the 29th day of January 1942.

GEORGE VICE,
U. S. Marshal.
By RAY RYAN,
Deputy.

105 In the United States Circuit Court of Appeals

[Title omitted.]

Return of Michael J. Roche, Judge of the District Court of the United States for the Northern District of California, Southern Division, and the District Court of the United States for the Northern District of California, Southern Division

Filed Feb. 9, 1942

To the Honorable CURTIS D. WILBUR, *Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit, and to the Honorable Judge of said Court:*

In compliance with the rule to show cause why a peremptory writ of mandamus or other appropriate writ should not be issued directing respondents, and each of them, to vacate those certain orders made by them on January 28, 1942, and more fully described in the petition for said writ filed herein, and to reinstate certain pleas in abatement and replications thereto, referred to in said petition, the above-named respondents do hereby respectfully present:

106 I

On June 3, 1941, in the March 1941 term of respondent court, there was returned and filed in said court an indictment entitled "United States of America v. Evaporated Milk Association, et al., No. 27257-R" in which the petitioners herein, and others, were named as defendants and charged with violations of Sec-

tions 1 and 3 of the Sherman Antitrust Act (15 U. S. C. §§ 1 and 3).

[Exhibit A attached to the petition filed herein is a true copy of said indictment.]

II

The grand jury which returned the said indictment was originally impaneled at and for the November 1940 term of respondent court, the said November 1940 term expiring at midnight March 2, 1941.

On February 28, 1941, the respondent court issued an order authorizing the said November 1940 term grand jury to continue to sit during the March 1941 term in the manner and for the purposes set forth therein.

[Page 11 of Exhibit G appearing at page 74 of the petition herein is a true and correct copy of said order.]

The said order was made and filed pursuant to a petition therefor duly made and filed by attorneys for the United States of America. The said petition, now in the custody of the clerk of respondent court, is stamped and endorsed by said clerk in
107 words and figures as follows:

"Filed Feb. 28, 1941. Walter B. Maling, Clerk."

[Exhibit B attached to the petition herein contains a true copy of the minutes of respondent court with reference to the aforesaid continuance of the November 1940 term grand jury, being the minutes of the sessions of said respondent court for February 26, March 4, and March 5, 1941.]

III

On July 2, 1941, the petitioners herein filed a motion for an order of court requiring, inter alia, disclosure of the date on which the investigation began which culminated in said indictment. One of the grounds on which such disclosure was sought was that it was information that could not be obtained by petitioners except upon order of the court. On August 6, 1941, the said motion for disclosure was granted.

On August 6, 1941, pursuant to the said order of respondent court granting the said disclosure, Charles S. Burdell, Esq., Special Attorney for the United States, affirmed in open court that the grand jury investigation of the matters set forth in said indictments "was begun shortly after November 6—in any event begun during the November term."

[Exhibit C attached to the petition herein is a correct copy of so much of the proceedings of respondent court on August 6, 1941, as relate to said disclosure.]

In a brief filed with respondent court on August 20, 1941, in opposition to petitioners' motions to quash the indictment,
108 counsel for the United States stated and disclosed that:

"* * * During the November 1940 Term the Grand Jury was engaged in the consideration of routine matters; and the matters relating to the indictment now under attack were not considered until February 28, 1941."

and in a foot note stated further:

"At the time the prosecution was requested to disclose the date of the commencement of the investigation, it was thought that it would be satisfactory simply to disclose the fact that the investigation began during the November 1940 Term. However, in a consideration of the motion and plea now at bar, the exact date of the commencement of the investigation is material."

On August 22, 1941, at the hearing before respondent court on the said motions to quash, there were disclosed and read into the records of respondent court the minutes of the November 1940 term grand jury for its session of February 28, 1941, as follows:

"Special meeting of the Federal Grand Jury held this day, Foreman Mrs. Hattie Sloss, presiding. Minutes of previous meeting read and approved as corrected (see below).* Special Assistant to the Attorney General Charles C. Pearce and Special Assistant Charles S. Burdell continued the presentation of the investigation of the peach industry for violation of the Sherman Anti-Trust Act. There being no further business the meeting adjourned." Signed, "C. N. Alexander, Secretary." and "Approved Eva L. Gibson, Foreman, pro tem."

*"The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun. Other industries named as sub-
109 ject to investigation are Salmon industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland, Asparagus and Cherries."

[Exhibit E attached to the petition herein is a true copy of the transcript of so much of the proceedings of August 22, 1941, as are pertinent to the matters set forth in said petition.]

IV

On August 29, 1941, a pleading was filed with respondent court on behalf of petitioner Carnation Company, entitled "Plea on

Behalf of Carnation Company" which contained five separate pleas in abatement.

[Exhibit F attached to the petition herein is a true copy of said pleading.]

On September 8, 1941, a demurrer to the aforesaid indictment and a motion for bills of particulars was filed on behalf of petitioner Swift & Co.

On September 13, 1939, all the petitioners herein, other than the said Carnation Company, filed a pleading entitled "Plea on Behalf of Certain Defendants" which contained four separate pleas in abatement.

[Exhibit G attached to the petition herein is a true copy of said pleading.]

On September 16, 1941, a demurrer to the said indictment was filed on behalf of all of the petitioners herein other than the said petitioner Swift & Co.

Ten separate pleadings containing motions for bills of particulars on behalf of substantially all of the petitioners
110 other than said petitioner Swift & Co. were filed between September 13 and September 16, 1941, inclusive.

On September 22, 1941, the Government filed separate replications to each of the aforesaid pleas in abatement, the text of which was as follows:

"Now comes the United States of America and denies generally each and every material allegation contained in the pleas heretofore filed in the above entitled case, which said pleas are included in the pleading entitled 'Plea on Behalf of Carnation Company (or 'Plea on Behalf of Certain Defendants')."

The first plea, the second plea, and the third plea contained in the said pleading entitled "Plea on Behalf of Certain Defendants," sometimes referred to in the proceedings before respondent court as the Pillsbury pleas, and the fourth plea and the fifth plea contained in the said plea on behalf of Carnation Company, sometimes referred to in the proceedings before respondent court as the Dunne pleas, were in effect pleas to the jurisdiction of the said November 1940 term grand jury and of the respondent court, in that they purported to allege that no investigation of any matter mentioned in the said indictment and no investigation of any defendant mentioned therein was begun during the November 1940 term of said grand jury and that no investigation of said matters of said defendants was begun on or before February 26, 1941.

V

On September 22, 1941, certain proceedings were had be-
111 fore respondent court with respect to the said pleas in

abatement and replications thereto. It was during this proceeding that the Government filed its aforesaid replications, following which Arthur B. Dunne, Esq., one of the counsel for petitioners, made a demand for jury trial as to the issues by the pleas in abatement and replications thereto.

Mr. Burdell, the Government counsel aforesaid, in discussing a proposed date for trial of said issues, stated to the court as follows:

"Might I say one further word, we have just set two pleas in abatement for trial in December. That is a long ways off, and I, personally, would like to get this thing settled prior to that time. I thought that we would settle it to-day on these denials that I have filed, because the pleas were supported by affidavits, and I thought those were the facts upon which counsel were going to rely, so I thought the thing could be settled on those facts."

[Exhibit H attached to the petition herein is a true copy of a part of the transcript of said proceedings before respondent court on September 22, 1941.]

VI

On September 22, 1941, the respondent court also had under consideration further motions for additional disclosures theretofore filed on behalf of the petitioners on August 29 and September 13, 1941.

The said motion for disclosure filed on behalf of petitioner Carnation Company on August 29, 1941, sought an order of the court in part as follows:

112 "1. * * * requiring disclosure of the facts (not conclusions) showing the date on which the investigation began which culminated in the indictment herein and showing among other things the following:

"(a) What proceedings were had before the November 1940 Term Grand Jury in respect of this defendant.

"(b) What proceedings were had before said Grand Jury in respect of this defendant on February 27, 1941 and on February 28, 1941.

"(c) What proceedings were had before said Grand Jury in respect of any other defendants named in the indictment herein.

"(d) What proceedings were had before said Grand Jury on February 27, 1941 and on February 28, 1941 in respect of any other defendant named in the indictment herein.

"(e) What proceedings were had before said Grand Jury in respect of this defendant or any other defendant named in the indictment herein prior to February 27, 1941.

"(f) The first date upon which the name of this defendant was mentioned to or before said Grand Jury.

"(g) The first date upon which the name of any other defendant named in the indictment herein was mentioned to or before said Grand Jury.

"(h) The first date upon which any witness was sworn and testified before said Grand Jury in respect of this defendant or any other defendant named in the indictment herein or in respect of any matter referred to in the indictment herein.

"(i) What proceedings in respect of investigation of the canned and evaporated milk industry were had prior to February 27, 1941, on February 27, 1941, and on February 28, 1941 before said Grand Jury.

"(j) The general nature and character of any evidence
113 introduced before said Grand Jury, if any there was, and whether there was any, prior to February 27, 1941, on February 27, 1941, and on February 28, 1941, respecting or touching upon this defendant, any other defendant named in the indictment, or any matter referred to in the indictment herein."

The said motion further sought the disclosure of any shorthand notes or transcripts of the said grand jury proceedings. The grounds for said motion for disclosure were in part as follows:

"(1) Upon the ground that *the said matters requested to be disclosed are unknown to this moving defendant*, and are secret, and cannot be ascertained by this defendant unless the court order the same disclosed to this defendant.

"(2) The said information is necessary in order to enable this defendant to sustain its plea and plea in abatement heretofore filed herein in the event of a traverse or denial of any of the allegations thereof.

"(3) Said information is necessary *in order to enable this defendant to ascertain whether any investigation of this defendant* or any other defendant named in the indictment herein, or any matter referred to in the indictment herein, or which culminated in the indictment herein *was commenced prior to the termination of the November 1940 Term* and if so, whether, prior to that time, any evidence, or any substantial evidence in the premises was introduced before said Grand Jury." [Italics supplied.]

[A copy of said notice of motion for disclosure is attached hereto, marked "Exhibit 1."]

In the course of the aforesaid proceedings before respondent court on September 22, 1941, counsel for the petitioners herein made the following statements to the respondent court in the course of his remarks:

114 "* * * we want to know the facts as distinguished from the conclusion of somebody, a layman's conclusion written into the grand jury minutes. We want to know what

actually happened there, and counsel on the other side are in a position certainly to know. * * * Now, on the issue of fact that is raised in this plea, the Government can provide us with them. We are making that motion, and *if we can get a proper disclosure of the matter I think we can proceed without a trial, and if we can not we will have to go to trial on the issues raised by the answer*" (Transcript p. 12).

"* * * You tell us what happened and I will submit it to his Honor, but *if we must go at it blind let us have a jury*" (Transcript p. 15).

"* * * I think the matter ought to stay just exactly as it is. *Let us find out what the facts are and submit it to a fact-finding body*, and then we can move on to some other controversy" (Transcript p. 19). [Italics supplied.]

On September 22, 1941, the respondent court denied the aforesaid motions for disclosure and ordered the pleas in abatement to be tried before a jury on December 3, 1941.

VII

On November 15, 1941, Wallace Howland, Esq., Special Assistant to the Attorney General, appeared before the respondent court and in open court stated that he had been requested by Herbert Clark, Esq., one of the attorneys for the petitioner herein, to seek a postponement of the jury trial on the pleas in abatement then set for December 3, as hereinbefore stated; that Mr. Herbert Clark's request was predicated upon the sudden necessity of a trip to the East coast from which he would return on or about
115 December 12; that since he (Mr. Howland) was then engaged in the trial of an antitrust case before another judge of respondent court, which was expected to continue for several weeks, that he (Mr. Howland) joined Mr. Herbert Clark in making this request of respondent court. Mr. Howland further stated that he contemplated filing certain motions to strike with respect to the pleas in abatement as soon as the exigencies of his trial work permitted and stated that a continuance of the trial date on the pleas in abatement until December 15, 1941, would be satisfactory both to him and to Mr. Herbert Clark. Pursuant to said requests the respondent court on November 15, 1941, postponed said jury trial on the pleas in abatement and put the said trial on the calendar for December 15, 1941, to be set for trial.

VIII

On December 8, 1941, the United States filed a pleading entitled "Notice of Motion for Leave to Withdraw Replications and to File Motions to Strike and Demurrers to Certain Pleas in Abatement." The said motion was addressed to the discretionary power

of the respondent court to permit the substitution of pleadings. Therein the United States requested permission of respondent court to withdraw the replications which it had filed on September 22, 1941, and to file motions to strike the first, second, third, fourth, and fifth Pillsbury pleas and the fourth and fifth Dunne pleas hereinbefore referred to.

116 [Exhibit J attached to the petition herein is a true copy of the said motion.]

IX

On January 28, 1942, after considering the written briefs and oral arguments of both sides, respondent court exercised its judicial discretion, and pursuant to said motion granted the United States permission to withdraw its said replications and to file motions to strike the said pleas in abatement.

Pursuant to said permission the United States then filed in open court its motions to strike the said pleas in abatement in the form and upon the grounds set forth in its said motion for leave to withdraw replications and to file motions to strike. Questions of law thus being presented, and having considered the points and authorities cited in the written briefs and oral arguments of both sides, the respondent court then ruled thereon and granted the said motion to strike the said pleas in abatement. Petitioners thereupon moved the respondent court to vacate its said orders permitting the substitution of pleadings and striking said pleas, to reinstate the said pleas and replications thereto and to reset the said pleas in abatement for jury trial. Due consideration having been given this motion by respondent court, the same was denied.

[Exhibit 2 attached to this return is a true copy of the minutes of respondent court for January 28, 1942, containing the orders referred to above.]

X

117 All of the hereinbefore described actions of respondent court taken on and after June 3, 1941, were taken by and through respondent the Honorable Michael J. Roche as judge of said court.

XI

It is respectfully submitted that petitioners' application for a writ of mandamus or other appropriate writ should be denied and the order to show cause herein be vacated for the following reasons:

(1) The petition filed herein does not allege such facts and circumstances as to warrant this Honorable Court to exercise its discretionary power to grant and issue the writ prayed for.

(2) In making its order, complained of herein, permitting the United States to withdraw its replications to the said pleas in abatement and to file motions to strike the same, respondent court was performing a judicial act within its jurisdiction and discretionary power and was thereby exercising its said judicial discretion.

(3) In granting the said motion of the United States to strike the said pleas in abatement and in making its said order striking the said pleas, respondent court correctly applied the law as made and established to the facts of the case at bar; and, even if error was committed, such questions of law are reviewable on appeal after trial on the merits of the cause and, therefore, do not constitute valid grounds to support the application for a writ of mandamus now under consideration.

XII

The respondents named herein, and each of them, do hereby designate Thurman Arnold, Assistant Attorney General, Frank J. Hennessy, United States Attorney, Tom C. Clark and Wallace Howland, Special Assistants to the Attorney General, and Fred S. Gilbert, Jr., Special Attorney, or such associate counsel
118 as they may select, to present this return and to file such brief and to make such argument as may be required on this rule to show cause.

Dated San Francisco, Calif., February 7, 1942.

MICHAEL J. ROCHE,
Michael J. Roche,
Respondent.

THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION,
TOM C. CLARK,
Tom C. Clark,
WALLACE HOWLAND,
Wallace Howland,
Special Assistants to the Attorney General.
FRED S. GILBERT, JR.,
Fred S. Gilbert, Jr.,
Special Attorney.

THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.
FRANK J. HENNESSY
Frank J. Hennessy,
United State Attorney.

119 *Exhibit 1 to return*

Arthur B. Dunne, 333 Montgomery Street, San Francisco, California, Telephone: Yukon 1977, Attorney for Defendant Carnation Company. Filed Aug. 29, 1941. Walter B. Maling, Clerk.

In the District Court of the United States of America, in and for the Northern District of California, Southern Division

March Term, 1941

No. 27,257–R

UNITED STATES OF AMERICA

vs.

EVAPORATED MILK ASSOCIATION, ET AL.

NOTICE OF MOTION FOR DISCLOSURE

To the United States of America and to its Attorneys Herein:

You will each please take notice that on Monday, the 8th day of September 1941, at the hour of 10:00 o'clock A. M. on said day, or as soon thereafter as counsel can be heard, defendant Carnation Company, by its attorney, will move the above-entitled court, division thereof presided over by Honorable Michael J.

120 Roche in his courtroom, in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, as follows:

1. For an order, addressed to the attorneys signing the indictment herein as representatives of the United States of America, and particularly Charles S. Burdell, Esq., and to Charles C. Pearce, Esq., Special Assistant to the Attorney General, and to the foreman of the November 1940 Term Grand Jury and to the secretary of said Grand Jury and to other persons having such information requiring disclosure of the facts (not conclusions) showing the date on which the investigation began which culminated in the indictment herein and showing among other things the following:

(a) What proceedings were had before the November 1940 Term Grand Jury in respect of this defendant.

(b) What proceedings were had before said Grand Jury in respect of this defendant on February 27, 1941 and on February 28, 1941.

(c) What proceedings were had before said Grand Jury in respect of any other defendants named in the indictment herein.

(d) What proceedings were had before said Grand Jury on February 27, 1941 and on February 28, 1941 in respect of any other defendant named in the indictment herein.

(e) What proceedings were had before said Grand Jury in respect of this defendant or any other defendant named in the indictment prior to February 27, 1941.

121 (f) The first date upon which the name of this defendant was mentioned to or before said Grand Jury.

(g) The first date upon which the name of any other defendant named in the indictment herein was mentioned to or before said Grand Jury.

(h) The first date upon which any witness was sworn and testified before said Grand Jury in respect of this defendant or any other defendant named in the indictment herein or in respect of any matter referred to in the indictment herein.

(i) What proceedings in respect of investigation of the canned and evaporated milk industry were had prior to February 27, 1941, on February 27, 1941, and on February 28, 1941 before said Grand Jury.

(j) The general nature and character of any evidence introduced before said Grand Jury, if any there was, and whether there was any, prior to February 27, 1941, on February 27, 1941, and on February 28, 1941, respecting or touching upon this defendant, any other defendant named in the indictment, or any matter referred to in the indictment herein.

2. For an order, addressed to the attorneys signing said indictment and particularly to Charles S. Burdell, Esq., and to Charles C. Pearce, Esq., Special Assistant to the Attorney General, to the clerk of the above-entitled court, to the foreman of said November 1940 Term Grand Jury, to the Secretary of said Grand Jury, to the reporter or stenographer who took notes of the pro-

122 ceedings before said Grand Jury and to any other person having such information or documents requiring the disclosure of any information, matter, or data, or other thing, going or touching upon any proceedings before said Grand Jury on February 27, 1941, or February 28, 1941, or any earlier date affecting or touching upon or mentioning this defendant or any defendant named in the indictment herein or any matter referred to in the indictment herein or any investigation of the canned and evaporated milk industry contained in:

(a) Any shorthand notes of any such proceedings.

(b) Any transcription of any shorthand notes of any such proceedings.

(c) Any other notes of such proceedings.

3. For a order, addressed to the persons hereinbefore referred to in the paragraphs numbered 1 and 2, or to any other person having such information, requiring the disclosure of any other records, papers, documents, things or information showing what, if any, proceedings were had before the said November 1940 Term Grand Jury, touching upon, affecting, or mentioning canned and evaporated milk industry, this defendant, any other defendant named in the indictment herein, or any other matter referred to in the indictment herein prior to February 27, 1941, or February 27, 1941, and on February 28, 1941, and requiring said persons to disclose what, if any, other steps were taken, in respect of any of said matters at said times, if any other steps were taken or
123 things were done in respect of any of said matters, other than before said Grand Jury.

Said motion will be made without waiver of any plea or any plea in abatement filed herein by this moving defendant, and, to the contrary, will be made in aid of said plea, and will be made upon the following grounds, severally and collectively:

(1) Upon the ground that the said matters requested to be disclosed are unknown to this moving defendant, and are secret, and cannot be ascertained by this defendant unless the court order the same disclosed to this defendant.

(2) The said information is necessary in order to enable this defendant to sustain its plea and plea in abatement heretofore filed herein in the event of a traverse or denial of any of the allegations thereof.

(3) Said information is necessary in order to enable this defendant to ascertain whether any investigation of this defendant or any other defendant named in the indictment herein, or any matter referred to in the indictment herein, or which culminated in the indictment herein was commenced prior to the termination of the November 1940 Term and if so, whether, prior to that time, any evidence, or any substantial evidence in the premises was introduced before said Grand Jury.

(4) The United States of America, through its attorneys herein, has, on August 6, 1941, and on August 22, 1941, made disclosures and as a result of said disclosures, of the recitals of
124 the indictment herein, of the application for an order continuing the November 1940 Term Grand Jury signed on February 25, 1941, and marked "Filed" by the clerk of the above-entitled court on February 28, 1941, and the proceedings had in respect of the Grand Jury in the above-entitled court on February 26, 1941, and February 28, 1941, this defendant is unable to ascertain when the investigation culminating in the indictment herein was begun, upon the ground that the United States of America, through its attorneys, has, in that respect, made inconsistent state-

ments, at times stating that said investigation was begun prior to February 26, 1941, and at other times that an investigation of the canned and evaporated milk industry (neither this defendant nor any other defendant named in the indictment herein, nor any other matter referred to in the indictment herein, nor any other matter referred to in the indictment herein, being named or referred to) was begun on February 27, 1941.

(5) This defendant is unable to ascertain whether the asserted investigation of the canned and evaporated milk industry asserted to have been begun on February 27, 1941, was an investigation of of this defendant or of any defendant referred to in the indictment herein or an investigation which culminated in the indictment herein.

(6) Without knowing the facts (as distinguished from conclusions) this defendant is unable to ascertain whether the investigation of the canned and evaporated milk industry,
125 stated in the minutes of the November 1940 Term Grand Jury to have begun on February 27, 1941, was in fact, as to this defendant, or any defendant named in the indictment herein or any matter referred to in the indictment herein, the beginning of an investigation by said Grand Jury within the meaning of § 284 of the Judicial Code, as amended (54 Stat. 110; 28 U. S. C. § 421).

(7) Without this information, this defendant is unable to ascertain whether any of the jurors who voted for the indictment herein did so without hearing a substantial portion of the evidence introduced before said Grand Jury in respect of the matters referred to in the indictment herein.

Said motion will be based upon all the records, papers and files in the above-entitled court relative to said Grand Jury and its proceedings, upon all of the records, papers, and files in the above-entitled cause, including the record of any and all proceedings had herein and the stenographic report thereof, upon this notice of motion, upon the authorities appended hereto, and upon the affidavit of Arthur B. Dunne filed in support hereof.

In the event said motion is denied, in whole or in part, this defendant respectfully excepts and reserves an exception to such denial.

Dated: San Francisco, California, August 29, 1941.

(s) ARTHUR B. DUNNE,
Attorney for Defendant Carnation Company.

126 MEMORANDUM OF AUTHORITIES

In support of the foregoing motion and the propriety of the granting of the same, defendant Carnation Company respectfully refers to the following authorities:

U. S. v. Socony Vacuum Oil Co., 310 U. S. 150, 234, 84 L. ed. 1129, 1174;

Metzler *v.* U. S., 64 F. 2d 203, 206 (C. C. A. 9);

Kirkland v. State, 218 S. W. 367 (Tex.);

Housel & Walser, Defending and Prosecuting Federal Criminal Cases, § 232 and cases there cited;

5 Cyclopedia of Federal Procedure, § 1995;

In re Grand Jury Proceedings, 4 Fed. Supp. 283; 28 C. J. 813, et seq.

Respectfully submitted.

(s) ARTHUR B. DUNNE,
Attorney for Defendant Carnation Company.

127 *Exhibit 2 to return*

Wednesday, January 28, 1942

27257-R

Present: Hon. MICHAEL J. ROCHE, D. J.

UNITED STATES OF AMERICA
vs.
EVAPORATED MILK ASSOCIATION, ET AL

After hearing Wallace Howland, Esq., Special Assistant to the Attorney General, it is ordered that this case as to the defendants Oregon Trade Regulation Association and San Diego Grocers' Fair Trade Practice Committee be continued to February 12, 1942, for arraignment. Thereupon the motion for leave to withdraw replications to pleas in abatement; the motion for leave to file motions to strike certain pleas in abatement, and the motion for leave to file demurrers to certain pleas in abatement, came on for further hearing. Wallace Howland and Fred S. Gilbert, Jr., Esqrs., were present for and on behalf of the United States. Arthur B. Dunne, Herbert W. Clark, Francis B. Kirkham, Lee M. Olds, Walter K. Olds, E. R. Hoerchner, and Moses Lasky, Esqrs., were present for and on behalf of certain defendants. After further argument by Mr. Dunne, Mr. Lasky and Mr. Howland, said motions were submitted to the Court for consideration and decision, and the Court being fully advised, it is Ordered that the motion for leave to withdraw replications to pleas in abatement be and the same is hereby granted and an exception allowed to each and every one of the defendants; that the motion for
128 leave to file motions to strike certain pleas in abatement be and the same is hereby granted and an exception allowed to

each and every one of the defendants, and that the motions for leave to file demurrer to certain pleas in abatement be and the same is hereby granted and an exception allowed to each and every one of the defendants. The motions to strike and Demurrer to certain pleas in abatement having been argued and submitted to the Court for consideration and decision and the Court being fully advised, it is Ordered that the Motions to strike the First, Second, Third, and Fourth such pleas, and each of them, contained in the pleading entitled "Pleas on Behalf of Certain Defendants" filed on September 13, 1941 by Messrs. Pillsbury, Madison & Sutro and associated counsel, be and the same are hereby granted; that said Motions to strike the Fourth Plea and Fifth Plea, and each of them, contained in the pleading "Plea on Behalf of Carnation Company" filed herein on August 29, 1941 by Arthur B. Dunne, Esquire, be and the same are hereby granted; that the demurrer to the First Plea, Second Plea, and Third Plea and each of them, contained in the pleading entitled, "Plea on Behalf of Carnation Company" filed herein on August 29, 1942 by Arthur B. Dunne, Esquire, be and the same is hereby sustained, and that each and every one of the defendants be allowed an exception to the ruling of the Court. Thereupon Mr. Dunne, on behalf of all and each of the defendants, made a motion to vacate the orders this day made herein and to reinstate the said pleas in abatement, and made a motion to set down the pleas in abatement for trial, which said motions were each denied and that each and every one of the defendants be allowed an exception to the ruling of
129 the Court. Thereupon the Demurrers to the Indictment came on to be heard. After argument by Herbert Clark, Esq. and Moses Lasky, Esq., on behalf of the defendants and in support of the demurrers, and after argument by Fred S. Gilbert, Jr., Esq., on behalf of the United States in opposition thereto, it is ordered that said demurrers be and each of them are hereby overruled. To which ruling of the Court each and every defendant duly excepted. After hearing the attorneys, it is Ordered that the defendants have to and including February 12, 1942 within which to file a brief in reply to the brief of the United States on the Motions for Bills of Particulars. Further Ordered that the motions for bill of particulars be continued to February 12, 1942, and it is further ordered that this case be continued to February 12, 1942, to plead.

[File endorsement omitted:]

130 IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Order of submission, etc.

Feb. 9, 1942

Ordered return of respondents to order to show cause, heretofore issued, together with supporting brief, filed.

Further ordered petition for writ of mandamus presented by Mr. Francis Kirkham, counsel for petitioners, and by Mr. Wallace Howland, Special Assistant To The Attorney General, counsel for respondent, and submitted to the court for consideration and decision, with leave to counsel for petitioners to file reply brief in five days; and with leave to counsel for respondent to reply thereto, within 5 days thereafter, if so advised.

131 In the United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted.]

Affidavit of Francis R. Kirkham

Filed Feb. 14, 1942

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Francis R. Kirkham, being first duly sworn, deposes and says:

The Federal Surplus Commodities Corporation, which is purchasing foods for lend-lease purposes, and the United States Army have requested the production of a minimum of 28,000,000 cases of evaporated milk this year for our army and its allies. The requirements of the Navy have not yet been given, but such requirements for 1942 will be greatly increased. The above amount of

132 28,000,000 cases is the minimum amount required, with as much more as possible needed. At the present time 1,000,000 cases of evaporated milk a week are being supplied to the Federal Surplus Commodities Corporation for lend-lease and to the Army. So far as is known, every evaporated milk plant in the United States is now in operation for 16 to 20 hours a day and many plants are working 24 hours a day. It is expected that all plants will be on a 24 hour basis as soon as the milk production reaches its seasonal peak. The defendants here under indictment have supplied, since the enactment of the Lend-lease Act, in excess of 14,304,000 cases of evaporated milk to the Army and Navy and

our allies. The defendant companies also have been called upon to supply vast quantities of other dairy products for similar purposes. To make such production possible is in large measure the responsibility of the individual petitioners. The program of production involves problems not only in manufacturing evaporated milk, but also in connection with obtaining necessary supplies for packaging and for expansion of plants. The boxes used in packaging evaporated milk for lend-lease and for army and navy purposes have the same priority rating as boxes for shells.

The war has imposed greatly added burdens and responsibilities on all petitioners. A few only are singled out for mention.

133 Petitioner Dan F. Stilling, who is in charge of the Administration of the Evaporated Milk Industry under the Department of Agriculture, has been assigned to the Washington office of the Evaporated Milk Industry to carry on with the officials of the Federal Government negotiations relating to the manufacture and production of evaporated milk.

Petitioner William T. Nardin, chief executive of the Pet Milk Company, was chief adviser to the Government with respect to evaporated milk during the first World War. In addition to his present duties as Chairman of the Board of Directors of the Federal Reserve Bank of St. Louis and Chairman of the Social Security Board for Missouri, he is one of the four members of the War Production Board Committee relating to the production of evaporated milk. Of the remaining three members of that committee, two are also petitioners here: Mr. Philip G. Kinzer, Vice President of the Carnation Company, and Mr. G. H. Benkendorf, General Manager of the Milk Producers' Association of Central California. Mr. Benkendorf is also an officer of the Dairy Products Marketing Association, operating under the Department of Agriculture. Petitioner Russell S. Waltz, Vice President and General Manager of Consolidated Dairy Products Company, is President of that Association.

FRANCIS R. KIRKHAM.

Subscribed and sworn to before me this 9th day of February 1942.

[SEAL] FRANK L. OWEN,
Notary Public,
in and for the City and County of
San Francisco, State of California.

[File endorsement omitted.]

134 In the United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted.]

Affidavit of Herbert W. Clark

Filed Feb. 19, 1942

STATE OF CALIFORNIA,
City and County of San Francisco, ss.

Herbert W. Clark, being first sworn according to law, deposes and says:

Affiant is a member of the law partnership of Morrison, Hohfeld, Foerster, Shuman & Clark, a member of the State Bar of California, and a member of the Bar of the above styled court, Affiant, for the above mentioned law partnership, has been since long before November 1, 1941 and is now in charge of the defense of Nestle's Milk Products, Inc., D. F. Norton and Jean N.
135 Bistline, and, with Messrs. Pillsbury, Madison & Sutro, of the defense of Evaporated Milk Association, Frank E. Rice and Dan F. Stilling, in the case of United States vs. Evaporated Milk Association et al, numbered 27,257-R on the register of actions in the District Court of the United States for the Northern District of California, Southern Division, and is the Herbert Clark named and referred to in paragraph VII (pages 10 and 11) of the Return of Michael J. Roche, Judge of the District Court etc. et al, which was filed in the Circuit Court of Appeals for the Ninth Circuit on Monday, February 9, 1942, in proceeding, No. 10,034.

When Judge Michael J. Roche, a respondent herein, ordered the pleas in abatement of the defendants in cause numbered 27,257-R to be tried before a jury on December 3, 1941, which order, according to affiant's present recollection, was made on September 22, 1941; affiant and other counsel for defendants announced in open court that there would be no delay or attempt at delay by defendants.

Wednesday morning, November 12, 1941, affiant received a long distance telephone request from George S. Leisure, Esquire, in New York City, that he, affiant, be in New York City on December 2, 1941, to attend a meeting of Advisory Counsel in a certain proceeding pending before the Federal Trade Commission. To this request affiant replied that if the trial of a case which had been set for December 3, 1941, at San Francisco was to go
136 forward, affiant would be unable to be in New York City on December 2, 1941, but that affiant would inquire of Gov-

ernment counsel concerning their plans and inform Mr. Leisure of the result.

Thursday morning, November 13, 1941, affiant went to the courtroom of Judge A. F. St. Sure and there saw Messrs. Tom C. Clark and Wallace Howland, Special Assistants to the Attorney General, who were engaged in the trial of a Sherman Anti-trust case before a jury. During a recess of said trial affiant stated to Messrs. Clark and Howland that he had been asked to be in New York City on a business matter on December 2, 1941, and wished to know whether the Government intended to go forward on December 3, 1941 with the trial of the pleas in abatement before Judge Roche. To this statement either Mr. Tom C. Clark or Mr. Wallace Howland (affiant does not distinctly remember which one but his present recollection is that it was Mr. Tom C. Clark) replied in substance that probably the trial of the pleas in abatement could not go forward on December 3, 1941, because Government counsel in that matter were and might continue to be engaged in the trial then in progress before Judge St. Sure. It was then suggested by either Mr. Tom C. Clark or Mr. Howland that the trial of the pleas in abatement be put over beyond December 3, 1941. Discussion then ensued between affiant and Mr. Howland concerning the date to which trial of the pleas in abatement should be continued and affiant distinctly recollects that Mr.

137 Howland expressed a preference for December 15, 1941, to which affiant raised no objection. It was thereupon agreed between Mr. Howland and affiant that Mr. Howland should endeavor to arrange the matter with Judge Roche. Upon returning to his office after the above mentioned conversation with Messrs. Tom C. Clark and Howland, affiant on November 13, 1941, dictated for his office memoranda a "time note" correctly setting forth the essential substance of the above mentioned conversation as follows:

"November 13, 1941—U. S. v. Nestle's Milk—Went to see Howland and Tom Clark to ascertain whether or not trial is going forward on December 3rd. They advised that in view of the fact they were engaged in the lumber trial they would have our case put over until after the middle of December at least. I called Harrison, Kirkham, Murphy and gave them this information."

In November 15, 1941, Mr. Howland informed affiant over the telephone that he, Howland, had arranged with Judge Roche to continue until December 15, 1941, to be then set for trial, the pleas in abatement, and also the arguments on the demurrers and motions for bills of particulars (which demurrers and motions defendants had been required to file although their pleas in abatement had not been disposed of).

On November 17, 1941, as is shown by affiant's office memoranda, and as affiant states, affiant "Called Mr. Leisure in New York and told him in view of postponement of trial in milk case I would be able to attend meeting of Advisory Counsel on Dec. 2nd." On November 25, 1941, affiant left San Francisco and did not return until December 10, 1941.

138 Affiant was not present at any discussion the said Wallace Howland, Esq., had with the court about postponing the trial date of the said pleas in abatement and, therefore, does not know what statements were made to the court about that matter. Affiant states, however, that he never authorized said Wallace Howland, Esq., or said Tom C. Clark, Esq., or any other person, to represent to the court that affiant was seeking a postponement of the jury trial on the said pleas in abatement then set for December 3, 1941, or that he was seeking a postponement of any matter whatsoever; that affiant never either directly or indirectly, expressly or impliedly, stated to either Tom C. Clark, Esq., or Wallace Howland, Esq., or to any other person, that he would request any postponement of the trial of said pleas in abatement.

HERBERT W. CLARK,
Herbert W. Clark.

Subscribed and sworn to before me this 13th day of February 1942.

EUGENE P. JONES,
Notary Public
in and for the City and County of
San Francisco, State of California.

[File endorsement omitted.]

139 In the United States Circuit Court of Appeals

[Title omitted.]

Stipulation as to return and order thereon

Filed Feb. 19, 1942

It is hereby stipulated and agreed that the return of Respondents herein, filed February 9, 1942, to the Order to Show Cause heretofore issued herein, may be enlarged to include the following papers and proceedings filed and had in Respondent Court in the cause therein pending entitled United States v. Evaporated Milk Association, et al., No. 27,257-R:

140 1. Indictment, filed June 3, 1941.

2. Notice of motion of certain defendants [Armour and Company of Delaware, et al.] to quash indictment, filed July 2, 1941.

3. Notice of motion for disclosure [Armour and Company of Delaware, et al.], filed July 2, 1941.

4. Order re motions to quash indictment and motions for disclosure. Made by the Court August 6, 1941.

5. Notice of motions to quash indictment [Virtually all Defendants], filed August 12, 1941.

6. Plea on behalf of certain defendants [Virtually all Defendants], filed August 14, 1941.

7. Demurrer [of United States, to Pleas in Abatement], filed August 20, 1941.

8. Stipulation in respect of disclosures, motion to quash indictment, and joinder in plea, and order, filed August 21, 1941.

9. Notice of motion of Carnation Company to quash indictment, filed August 21, 1941.

10. Order re motions to quash indictment and pleas in abatement. Made by the Court August 22, 1941.

11. Plea on behalf of Carnation Company, filed August 29, 1941.

12. Notice of motion for disclosure [Carnation Company], filed August 29, 1941.

13. Affidavit of Arthur B. Dunne, filed August 29, 1941.

14. Demurrer of defendant Swift & Company to the indictment, filed September 8, 1941.

15. Plea on behalf of certain defendants (Virtually all Defendants, except Carnation Company], filed September 13, 1941.

16. Notice of motions for order directing compliance with court's order of August 6, 1941, and for other relief [Virtually all defendants, except Carnation Company], filed September 13, 1941.

141 17. Demurrers of undersigned defendants, severally, to indictment [Virtually all Defendants, except Swift & Company], filed September 16, 1941.

18. Replication [of United States, to Plea on Behalf of Carnation Company], filed September 22, 1941.

19. Replication [of United States, to Plea on Behalf of Certain Defendants], filed September 22, 1941.

20. Order denying motions to direct compliance with court's order and motions for disclosure, and continuing case to December 3, 1941. Made by the Court September 22, 1941.

21. Order continuing case from December 3, 1941, to December 15, 1941. Made by the Court November 15, 1941

22. Notice of motion [of United States] for leave to withdraw replications and to file motions to strike and demurrers to certain pleas in abatement, filed December 8, 1941.

23. Order of direction as to filing briefs, and continuing the hearing on pleas, motions, and demurrers to January 26, 1942. Made by the Court December 15, 1941.

24. Order continuing further argument on motions to withdraw replications, for leave to file motion to strike, for leave to file demurrers to pleas in abatement until January 28, 1942. Made by the Court January 26, 1942.

25. Motions [of United States] to strike and demurrer to certain pleas in abatement, filed January 28, 1942.

26. Orders granting motions to strike, sustaining demurrers to pleas, overruling demurrers to the indictment, setting time for the filing of briefs, and continuing motions for bills of particulars to February 12, 1942. Made by the Court January 28, 1942.

142 In order to abbreviate the record before this Court, it is stipulated and agreed by the respective parties that the petitioners other than Carnation Company who did not join in the motion to quash filed on behalf of Armour and Company of Delaware, et al, on July 2, 1941, filed on or about that date motions to quash which set forth substantially all contentions advanced on said motion to quash of Armour and Company of Delaware, et al.

It is further stipulated and agreed by the respective parties that the petitioners other than Carnation Company who did not join in the motion for disclosure filed on behalf of Armour and Company of Delaware, et al. on July 2, 1941, filed on or about that date motions for disclosure which set forth substantially all contentions advanced on said motion for disclosure of Armour and Company of Delaware, et al.

Dated San Francisco, Calif., February —, 1942.

(Sgd.) Tom C. Clark—Tom C. Clark; (Sgd.) Wallace Howland—Wallace Howland, Special Assistants to the Attorney General; (Sgd.) Fred S. Gilbert, Jr.—Fred S. Gilbert, Jr., Special Attorney, Attorneys for
143 Respondents; (Sgd.) Pillsbury, Madison & Sutro—Pillsbury, Madison & Sutro; (Sgd.) Marshall P. Madison—Marshall P. Madison; (Sgd.) Francis R. Kirkham—Francis R. Kirkham; (Sgd.) Morrison, Hohfeld, Foerster, Shuman & Clark—Morrison, Hohfeld, Foerster, Shuman & Clark; (Sgd.) Herbert W. Clark—Herbert W. Clark; (Sgd.) Dunne & Dunne—Dunne & Dunne; (Sgd.) Arthur B. Dunne—Arthur B.

Dunne; (Sgd.) Webb, Webb & Olds—Webb, Webb & Olds; (Sgd.) U. S. Webb—U. S. Webb; (Sgd.) Walter K. Olds—Walter K. Olds; (Sgd.) Broebeck, Phleger & Harrison—Brobeck, Phleger & Harrison; (Sgd.) Maurice E. Harrison—Maurice E. Harrison; (Sgd.) Willis I. Morrison—Willis I. Morrison; (Sgd.) Lee M. Olds—Lee M. Olds; (Sgd.) Joseph A. Murphy—Joseph A. Murphy; (Sgd.) Nat Brown—Nat Brown;
144 (Sgd.) J. Wesley Cupp—J. Wesley Cupp; (Sgd.) E. R. Hoerchner—E. R. Hoerchner; (Sgd.) W. E. Foley—W. E. Foley; (Sgd.) James E. Foley—James E. Foley; (Sgd.) Patrick A. Geraghty—Patrick A. Geraghty, Attorney for the Several Petitioners.

FEBRUARY 19, 1942.

It is so ordered.

FRANCIS A. GARRECHT,
Circuit Judge.

[File endorsement omitted.]

145 In the United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted.]

Enlarged return of respondents

Filed Feb. 19, 1942

(Consisting of Records Filed and Proceedings Had in District Court, Assembled in Convenient Form.)

THURMAN ARNOLD,
Assistant Attorney General.
FRANK J. HENNESSY,
United States Attorney.
TOM C. CLARK,
WALLACE HOWLAND,
Special Assistants to the Attorney General.
FRED S. GILBERT, JR.,
Special Attorney.
Attorneys for Respondents.

[File endorsement omitted.]

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148 Indictment

[Omitted. Printed side page. 24 ante.]

162 In United States District Court

Notice of motion of certain defendants to quash indictment

To UNITED STATES OF AMERICA AND TO ITS ATTORNEYS herein, namely, THURMAN ARNOLD, *Assistant Attorney General;* FRANK J. HENNESSY, *United States Attorney;* TOM C. CLARK and M. S. HUBERMAN, *Special Assistants to the Attorney General;* LAURENCE P. SHERRY, CHARLES S. BURDELL, FRED S. GILBERT, JR., and JOSEPH L. ALIOTO, *Special Attorneys.*

Please take notice that on Monday, July 7, 1941, in the courtroom of the above entitled court, in the Post Office Building, San Francisco, California, at the hour of 10:00 A. M., or as soon thereafter as counsel can be heard, the following defendants in the above entitled cause, namely, Armour and Company of Delaware, The Borden Company, Pet Milk Company, Pet Milk Sales Corporation, Libby McNeill & Libby, Inc., Sego Milk Products Company, Golden State Company, Ltd., William T. Nardin, A. W. Ramsdell, Earl L. Miller, Siegfried P. Harter, Ralph Wanzer, J. F. Valois, George Campbell, and William Henry, and each of said defendants, severally and separately, will move the court to quash the indictment herein, and each count thereof. Said motion will be made upon the following grounds, severally and collectively each of said grounds being hereby specified as a ground of motion against said indictment, and each count thereof, on behalf of each of said moving defendants.

162A It appears on the face of the record of the proceedings relative to the Grand Jury which returned the indictment herein, including the minutes of the court:

1. Said Grand Jury was impaneled on or about November 6, 1940, and for the November, 1940, terms of this court; on or about February 28, 1941, said Grand Jury was continued in existence by order of the court into the March 1941 term "solely to finish investigations begun but not finished by said Grand Jury"; prior to February 28, 1941, one member of said Grand Jury had died; on March 4, 1941, four members thereof were excused by the court and five other persons were impaneled as members of said Grand Jury, and they thereafter participated in its proceedings; said persons did not hear all of the evidence on which the indictment herein was purportedly based and did not hear the evidence introduced prior to their impanelment; at the time of impaneling said new members.

"The Court further advised the Grand Jury that in order that the new members of the Grand Jury might become fully acquainted with those matters which had been begun but not yet finished by said Grand Jury, that it would be well for said Grand Jury to bring to the attention of the new members of said Grand Jury all those matters which had been brought to the attention of the previous panel, and which they had already undertaken to investigate but which were not yet finished. Thereupon the Grand Jury was permitted to retire to the Grand Jury Room."

In addition to said five members added to said Grand Jury in the midst of its investigations, one member of said Grand Jury was excused from its deliberations for a period of sixty days.

2. Said indictment was irregularly and unlawfully returned by reason of the facts herein stated, or apparent on the face of the record, and for the following reasons, severally and collectively:

(a) A substantial number of the members of said Grand Jury did not hear a substantial part of the evidence on which said indictment was returned;

163 (b) Said last mentioned members were admonished as aforesaid by the court;

(c) By said admonition said last mentioned members were authorized and directed by the court to consider in the deliberations of said Grand Jury hearsay statements in lieu of evidence;

(d) By said admonition said last mentioned members were authorized and directed by the court to consider in the deliberations of said Grand Jury unsworn statements in lieu of evidence;

(e) By said admonition said members were authorized by the court to act upon said indictment notwithstanding that they did not hear a substantial part of the evidence;

(f) The proceedings before a Grand Jury constitute a judicial inquiry; to act upon evidence is of the essence of a judicial inquiry; nothing can be treated as evidence in a judicial inquiry which is not introduced as such;

(g) Said proceedings of said Grand Jury were contrary to elementary standards of fairness and reasonableness necessary to constitute due process of law;

(h) More than twenty-three persons participated as grand jurors in the deliberations of the said Grand Jury;

(i) Said Grand Jury was not a Grand Jury within the meaning of the Constitution and statutes of the United States;

(j) Said purported indictment is not an indictment nor an information and was not returned as a result of any proceeding authorized by the Constitution and laws of the United States whereby a defendant can be held to answer for an offense against the United States;

(k) The summoning and impaneling of such five other persons as members of said Grand Jury on March 4, 1941, was not authorized by law or by any statute of the United States, and particularly not by section 284 of the Judicial Code, as amended April 17, 1940 (54 Stat. 110; U. S. C. 28:421), inasmuch as
164 only four members of the Grand Jury were excused after the end of the term for which the Grand Jury was originally summoned, or at any other time, and five other persons were summoned and impaneled on March 4, 1941, as the result whereof unauthorized persons were present in the Grand Jury room at the sessions of said Grand Jury.;

(l) The summoning and impaneling of such five additional persons and the continuance of said Grand Jury into the March 1941 term was beyond the jurisdiction of the court.

3. If any defendant is held to answer under said indictment, then, for the reasons herein stated, severally and collectively, such defendant would be held to answer herein contrary to and in violation of the rights and privileges of such defendant under the Fifth Amendment to the Constitution of the United States.

4. In so far as any of said proceedings of or connected with said Grand Jury may purport or be claimed to be justified by any statute of the United States, and particularly by section 284 of the Judicial Code, as amended April 17, 1940 (54 Stat. 110; U. S. C. 28:421), such statute, for the reasons herein stated, severally and collectively, is contrary to and in violation of the rights and privileges of each of said moving defendants under the Constitution of the United States, particularly the Fifth Amendment thereto.

5. Said indictment is not sufficient in law to require the defendants to plead thereto.

6. Said indictment does not state facts sufficient to constitute a crime or offense against the United States.

7. Said indictment does not state facts with sufficient accuracy and particularly to inform defendants, or any of them, of the offense charged against them.

165 8. Said indictment is so vague, general, and indefinite that each moving defendant, although placed in jeopardy herein, would not be protected from a second prosecution for the same alleged offense.

Said motion will be based upon all the records and files of the above entitled court relative to said Grand Jury and its proceedings, including, without limitation, the documents hereto attached marked Exhibit A, and will also be based upon all the records and files in the above entitled cause, including this notice of motion and memorandum of authorities hereto attached.

In the event of denial of said motion, each of the moving defendants respectfully reserves an exception.

Dated: San Francisco, California, July 2, 1941.

PILLSBURY, MADISON & SUTRO,
FELIX T. SMITH,
MARSHALL P. MADISON,
EUGENE M. PRINCE,
FRANCIS R. KIRKHAM,
Attorneys for said Moving Defendants.

[Endorsed:] Filed, July 2, 1941.

[Exhibit A omitted. Printed side page. 38 ante.]

176 In United States District Court

Notice of motion for disclosure

To UNITED STATES OF AMERICA AND TO ITS ATTORNEYS herein, namely, THURMAN ARNOLD, *Assistant Attorney General;* FRANK J. HENNESSY, *United States Attorney;* TOM C. CLARK, and M. S. HUBERMAN, *Special Assistants to the Attorney General;* LAURENCE P. SHERFY, CHARLES S. BURDELL, FRED S. GILBERT, Jr., and JOSEPH L. ALIOTO, *Special Attorneys.*

Please take notice that on Monday, July 7, 1941, in the courtroom of the above-entitled court, in the Post Office Building, San Francisco, California, at the hour of 10:00 a. m., or as soon thereafter as counsel can be heard, the following defendants in
177 the above entitled cause, namely: Armour and Company of Delaware, The Borden Company, Pet Milk Company, Pet Milk Sales Corporation, Libby, McNeill & Libby, Inc., Sego Milk Products Company, Golden State Company, Ltd., William T. Nardin, A. W. Ramsdell, Earl L. Miller, Siegfried P. Harter, Ralph Wanzer, J. F. Valois, George Campbell, and William Henry, and each of said defendants, severally and separately, will move the court:

a. For an order, pursuant to law and particularly under the Act of April 30, 1934 (48 Stat. 649; U. S. C., 18:554a), directing the clerk of this court to make public the record of the number of grand jurors concurring in the finding of the indictment herein; and

b. For an order requiring the disclosure, by the secretary of the Grand Jury which returned said indictment, or other proper officer or representative of the court, or other peson, of the attendance record of said Grand Jury; and

c. For an order, addressed to the attorneys signing said indictment as representatives of the United States, or other persons

having such information, requiring the disclosure of the names of persons present during the deliberations of such Grand Jury, and their authorization for being so present; and

d. For an order, addressed to the said attorneys, or any other person having such information, requiring disclosure of the date on which the investigations began which culminated in said indictment.

Said motion will be made upon the following grounds, severally and collectively:

1. It appears on the face of the record of the proceeding relating to the Grand Jury which returned said indictment, includ-
178 ing the minutes of the court, that said Grand Jury was continued in existence from the November 1940 into the March 1941 term of court; that certain members were excused from and certain members were added to said Grand Jury during its investigations concerning said indictment; that at least one member of the Grand Jury died and another was absent from its deliberations for a long period of time.

2. Without the information sought in paragraphs *a* and *b* above, it cannot be ascertained how many grand jurors participated in the deliberations of said Grand Jury or voted in favor of said indictment notwithstanding that they did not hear a substantial part of the evidence (it appearing on the face of the record that the number was at least six).

3. Without the information sought in paragraphs *a* and *b* above, it cannot be ascertained whether any unauthorized person participated in said Grand Jury proceedings.

4. Without waiving any objection to the constitutionality or validity of section 284 of the Judicial Code, as amended (54 Stat. 110; U. S. C. 28:421), or any other objection whatever, the moving defendants each specify that unless said investigation was commenced during the November 1940 term of court, the court had no jurisdiction to continue said Grand Jury in existence thereafter.

5. All of the information of which disclosure is sought hereby is information which cannot be obtained by defendants except upon order of the court.

This motion will be based upon all the records and files of the above entitled court relative to said Grand Jury and its proceedings, and will also be based upon all the records and files in the above entitled cause, including this notice of motion, and memorandum of authorities filed herewith.

The moving defendants make this motion with express reservation and without waiver of their motion to quash, notice
179 of which is filed contemporaneously herewith, or of any right or objection.

Each of said defendants respectfully reserves an exception in event of the denial hereof.

Dated: San Francisco, California, July 2nd, 1941.

PILLSBURY, MADISON & SUTRO,
FELIX T. SMITH,
MARSHALL P. MADISON,
EUGENE M. PRINCE,
FRANCIS R. KIRKHAM,
Attorneys for said Moving Defendants.

[Endorsed] Filed, July 2, 1941.

In United States District Court

Order re motions to quash the indictment and motions for disclosure

Wednesday, August 6, 1941—July 1941 Term

Before Honorable MICHAEL J. ROCHE, District Judge

No. 27257-R

UNITED STATES OF AMERICA
vs.
EVAPORATED MILK ASSOCIATION, ET AL.

The motions to quash Indictment and the motions for disclosure, having been heretofore heard and submitted, being now fully considered, it is ordered that the motions to quash Indictment be and the same are hereby denied as to all defendants who have heretofore filed a motion to quash Indictment, to which ruling of the Court each of said defendants duly excepted;
180 further ordered that the motions for disclosure be and the same are hereby granted as to all defendants who have heretofore filed a motion for disclosure.

* * * * *

(The remainder of the foregoing order refers to the arraignment of various defendants, to the continuance of arraignment as to others and to the continuance of the case to September 22, 1941 for further defendants to plead.)

In United States District Court

Notice of motions to quash indictment

To UNITED STATES OF AMERICA AND TO ITS ATTORNEYS herein, namely, THURMAN ARNOLD, *Assistant Attorney General*, FRANK J. HENNESSY, *United States Attorney*, TOM C. CLARK *and* M. S. HUBERMAN, *Special Assistants to the Attorney General*, LAWRENCE P. SHERFY, CHARLES S. BURDELL, FRED S. GILBERT, Jr., and JOSEPH L. ALIOTO, *Special Attorneys*.

Please take notice that on Thursday, August 14, 1941, in the courtroom of the above entitled court, in the Post Office Building, San Francisco, California, at the hour of 10:00 a. m., or as soon thereafter as counsel can be heard, all the defendants who have heretofore appeared in the above entitled cause, including without limitation each and every defendant present in court herein in person or by attorney on August 6, 1941, and each of said defendants, severally and separately, will move the court to quash the indictment herein, and each count thereof.

This motion will be made upon the following grounds,
181 severally and collectively, each of said grounds being hereby specified as a ground of motion against said indictment, and each count thereof, on behalf of each of said moving defendants.

It appears on the face of the record of this cause and of the proceedings relative to the grand jury which returned the indictment herein, including the minutes of this court:

1. Said Grand Jury was sworn and impaneled on November 6, 1940, and the indictment herein was voted on May 29, 1941. Twenty-one grand jurors were present at the session of May 29, 1941, at which said indictment was voted. Eighteen of said grand jurors voted for said indictment, and two of them were absent from said session of May 29, 1941, and did not vote.

2. Said twenty-one grand jurors who were present at said session of May 29, 1941, included the five substitute grand jurors who were added to said grand jury by order of this court and sworn and impaneled as members of said grand jury on March 4, 1941.

3. Of said twenty-one grand jurors only five were present at every session of said grand jury, and all of the remaining sixteen were absent for varying and substantial periods of time and did not hear a substantial amount of the evidence presented to said grand jury.

4. The number of absences from the sessions of said grand jury among said twenty-one grand jurors present at said session at which the indictment herein was voted are as follows:

Number of jurors	Sessions absent	Approximate percentage of sessions absent	Number of jurors	Sessions absent	Approximate percentage of sessions absent
1	24	48	1	9	18
2	23	46	1	7	14
2	22	44	182 1	6	12
1	16	32	1	3	6
1	11	22	5	1	2

5. Less than twelve qualified persons who served on said grand jury concurred in the finding of said indictment.

6. There were less than twelve of said grand jurors who were not absent during a substantial number of the sessions held by said grand jury for the consideration of said indictment.

7. Each of said five substitute grand jurors who were sworn and impaneled as aforesaid participated in the hearings and deliberations and voted on the indictment herein. None of them was summoned for such service as grand jurors after the end of the term for which the grand jury was originally summoned, in that prior to March 2, 1941, each of them was personally served by the marshal of this court with process commanding his appearance before this court for such service, all in violation of the Act of April 17, 1940, chapter 101 (U. S. C. 28: 421).

8. There were less than sixteen legally authorized and qualified members of said grand jury present at eleven of the sessions thereof at which evidence was presented which related to the subject matter of the indictment herein and upon which said indictment was based.

9. Said five substitute grand jurors participated in sessions of said grand jury and were unauthorized persons present in the grand jury room.

10. Because of the additional substantial prejudice resulting from facts hereinbefore stated, and first made known to defendants after the granting of motions for disclosure herein, each moving defendant specifies as a ground of motion herein the grounds of motion stated in paragraphs 1, 2 (b), 2 (c), 2 (d) and 2 (e) of the notice of motion of certain defendants to quash
183 indictment, filed with the clerk of this court on July 2, 1941, to wit: On March 4, 1941, the court erroneously instructed said five substitute members of said grand jury (said five members did not include either of said two nonvoting members) to con-

sider hearsay evidence in lieu of evidence, to consider in their deliberations unsworn statements in lieu of evidence, and to act upon evidence, a substantial part of which they did not hear.

11. Said grand jury was not a grand jury within the meaning of the Constitution and statutes of the United States.

12. Said purported indictment is not an indictment or an information and was not returned as a result of any proceeding authorized by the Constitution and laws of the United States whereby a defendant can be held to answer for an offense against the United States.

13. If any defendant is held to answer under said indictment, then, for the reasons herein stated, severally and collectively, such defendant would be held to answer herein without due process of law, contrary to and in violation of the rights and privileges of such defendant under the Fifth Amendment to the Constitution of the United States.

Said motion will be based upon all the records and files of the above entitled court relative to this cause and to said grand jury and its proceedings, including, without limitation, the minutes of this court, the reporter's transcript of the proceedings in open court herein, the attendance record of said grand jury, a copy of which is attached hereto, the record of the return of service of process of said five substitute grand jurors showing that each of them was summoned prior to March 2, 1941, to wit, on February 27, 1941, February 28, 1941, and March 1, 1941, this notice of motion, and memorandum of authorities hereto attached.

In the event of denial of said motion, each of said moving defendants respectfully reserves an exception.

184

Dated San Francisco, California, August 12, 1941.

Pillsbury, Madison & Sutro; Eugene M. Prince; Morrison, Hohfeld, Foerster, Shuman & Clark; Herbert W. Clark; Brobeck, Phleger & Harrison; Maurice E. Harrison; Webb, Webb & Olds; Walter K. Olds; Willis I. Morrison; Lee M. Olds; Joseph A. Murphy; Nat Brown, J. Wesley Cupp, E. R. Hoerchner, W. E. Foley, James E. Foley, T. B. Scott, Attorneys, respectively, for Moving Defendants.

ORDER SHORTENING TIME

Good cause appearing therefor, the time for service of the foregoing notice of motion is shortened so that service thereof shall be timely if made at any time on or before Wednesday, August 13, 1941.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed, August 12, 1941.

187 In United States District Court

Plea on behalf of certain defendants

Each of the defendants herein who has heretofore appeared in the above entitled cause, including, without limitation, each and every defendant present in court herein in person or by attorney on August 6, 1941, severally and separately, and as and for a plea to the indictment herein and each count thereof states and alleges as follows:

1. The grand jury which returned the indictment herein was originally summoned for the November 1940 term of this court. Said term expired at midnight on March 2, 1941.

2. On February 26, 1941, this court ordered to be issued, and there was issued, a venire for twenty persons for the purpose of selecting substitute grand jurors. In pursuance of said order the United States Marshal personally served said writ on the following five persons, who were among said twenty persons, on the dates set opposite their names: Mary J. Ball, February 27, 1941; Barry W. Boland, March 1, 1941; Frances M. Bowes, February 27, 1941; Pearl Klein, February 28, 1941; Gerald F. Herrmann, February 28, 1941. None of said five persons was served with any other or different process relating to said grand jury other than as aforesaid.

3. On March 4, 1941, said five persons were selected, sworn and impaneled as substitute grand jurors on said grand jury, and thereafter they participated in the hearings and deliberations and vote on the indictment herein. Not counting said five persons, there were less than sixteen persons present as grand jurors at eleven sessions of said grand jury between March 4, 1941, and May 29, 1941. Not counting said five persons, there were only
188 fifteen such persons present as grand jurors at seven of said sessions; only fourteen present at three of said sessions; and only twelve present at one of said sessions.

4. Said grand jury voted on the indictment herein at a session held on May 29, 1941. Two grand jurors were absent from said session and did not vote. Of the twenty-one grand jurors present only eighteen voted for said indictment. No other or different vote on said indictment has been taken since said vote of eighteen, and said two grand jurors who did not vote were not impaneled as substitute grand jurors.

5. Only five of said members were present at every one of said sessions. Less than twelve of said eighteen grand jurors who voted for said indictment were not absent a substantial number of said sessions. The number of grand jurors with the number of said sessions they were absent is:

Number of jurors	Sessions absent	Approximate percentage of sessions absent	Number of jurors	Sessions absent	Approximate percentage of sessions absent
1	24	48	1	9	18
2	23	46	1	7	14
2	22	44	1	6	12
1	16	32	1	3	6
1	11	22	3	1	2

6. Each defendant first learned of the number of absences of said grand jurors and of the numerical vote for said indictment on August 6, 1941, on which day each defendant obtained the attendance record of said grand jury, a copy of which is attached hereto as Exhibit A and incorporated herein. Each defendant could not have ascertained either of said facts prior thereto. Said attendance record and the number of grand jurors voting for said indictment and the date of such vote were disclosed only after a motion for disclosure thereof was granted on August 6, 1941, by the court.

189 7. Referred to and incorporated herein by reference are all the records and files of the above-entitled court relative to this cause and to said grand jury and its proceedings, including, without limitation, the minutes of this court and the reporter's transcript of the proceedings in open court herein.

As and for a *second*, separate, and distinct plea to the indictment herein, and each count thereof, each of said defendants, severally and separately, states and alleges as follows:

1. The statements and allegations contained in paragraphs 1, 2, 3, 6, and 7 of the first plea herein referred to are incorporated herein.

As and for a *third*, separate, and distinct plea to the indictment herein, and each count thereof, each of said defendants, severally and separately, states and alleges as follows:

1. The statements and allegations contained in paragraphs 1, 4, 5, 6, and 7 of the first plea herein referred to are incorporated herein.

Wherefore, each of said defendants prays judgment of the said indictment that the same be quashed and dismissed and further whether the United States of America ought or can prosecute it or him for the premises, and that it or he be discharged thereof without delay.

Pillsbury, Madison & Sutro, Eugene M. Prince; Morrison, Hohfeld, Foerster, Shuman & Clark, Herbert W. Clark; Brobeck, Phleger & Harrison, Maurice E. Harrison; Webb, Webb & Olds, Walter K. Olds; Willis I. Morrison; Lee M. Olds; Joseph A. Murphy; Nat Brown; J.

Wesley Cupp; E. R. Hoerchner; W. E. Foley; James E. Foley; T. B. Scott; Attorneys, respectively, for Moving Defendants.

190 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Eugene M. Prince, being first duly sworn deposes and says: That he is an attorney of record for certain defendants herein; that he has read the foregoing pleas and knows the contents thereof, and the same are true of his own knowledge; that, being duly authorized, he makes this verification on behalf of each and every defendant joining in said pleas; that it would be impossible for all said defendants to obtain personal knowledge of the facts therein stated within the time required by law for the making of the foregoing pleas.

EUGENE M. PRINCE.

Subscribed and sworn to before me this 14th day of August 1941.

[SEAL] FRANK L. OWEN,
Notary Public
in and for the City and County of
San Francisco, State of California.

[Endorsed:] Filed, August 14, 1941.

(Exhibit, *Ante*, P. P. 39 and 40)

In United States District Court

Demurrer.

Comes now the United States of America, by its attorneys herein, and demurs to each and every plea contained in that
191 certain pleading heretofore filed in the above-entitled matter designated "Plea on Behalf of Certain Defendants," on the grounds that the allegations contained in said pleas, or pleading, whether they be construed separately or collectively, do no constitute sufficient grounds for abatement of the indictment herein:

TOM C. CLARK,
M. S. HUBERMAN,
Special Assistants to the Attorney General.
CHARLES S. BURDELL,
Special Attorney.

THURMAN ARNOLD,
Assistant Attorney General.
FRANK J. HENNESSY,
United States Attorney.

I certify that the within demurrer is, in my opinion, good in law and is not taken for purposes of delay.

CHARLES S. BURDELL,
Special Attorney.

[Endorsed:] Filed, August 20, 1941.

In United States District Court

Stipulation in respect of disclosures, motion to quash indictment, and joinder in plea, and order

It is stipulated in the above entitled case, by and between United States of America and Carnation Company, one of the defendants, by their respective attorneys, as follows:

1. It is deemed that Carnation Company, one of the defendants herein, upon written notice of motion, in terms the same as the notice of motion for disclosure filed herin on July 2, 1941 by and on behalf of Armour and Company of Delaware and other defendants therein named, by their attorneys, Messrs.
192 Pillsbury, Madison & Sutro, Felix T. Smith, Marshall P. Madison, Eugene M. Prince, and Francis R. Kirkham, has, in accordance with such notice of motion, moved the above entitled court as therein specified, supporting said motion by the same showing made in support of the motion heretofore made by said other defendants; that the said motion was granted, as in the case of said other named defendants, that the same disclosure has been made to Carnation Company as to said other named defendants, both in form and effect, and that Carnation Company may have all of the benefits of said disclosure with the same force and effect as though made to it, and that as to it all of the said matters heretofore so disclosed to the other said named defendants shall be deemed matters of record herein and available for use by it prior to and on the making of the motion to quash herein by Carnation Company.

Dated At San Francisco, California, August 21st, 1941.

TOM C. CLARK,
M. S. HUBERMAN,
Special Assistants to the Attorney General.
CHARLES S. BURDELL,
Special Attorney
For the United States of America.
ARTHUR B. DUNNE,
Attorney for Defendant, Carnation Company.

ORDER

The court having read the foregoing stipulation, being advised in the premises, and good cause appearing therefore, it is

Ordered, that the foregoing stipulation be, and the same is hereby approved, and it is ordered accordingly.

Dated August 21st, 1941.

MICHAEL J. ROCHE
District Judge.

[Endorsed] Filed, August 21, 1941.

In the United States District Court

Notice of motion of Carnation Company to quash indictment

To The United States of America and to its Attorneys herein:

You will each please take notice that on the 22nd day of August 1941 at the hour of 10:00 o'clock A. M., on said day, or as soon thereafter as counsel can be heard, defendant Carnation Company, by its attorney, will move the above entitled court in its courtroom, in the United States Post Office Building, 7th and Mission Streets, San Francisco, California, to quash the indictment herein and each count thereof. Said motion will be made severally as to each count.

Said motion will be made upon the following grounds, severally and collectively, each thereof being specified as a ground of motion against said indictment, and each count thereof. The said grounds of motion are as follows:

1. Said Grand Jury was impaneled on November 6, 1940, term of this court; on or about February 28, 1941, said Grand Jury was continued in existence by order of the court into the March, 1941, term "solely to finish investigations begun but not finished by said Grand Jury"; prior to February 28, 1941, one member of said Grand Jury had died; on March 4, 1941, four members
194 thereof were excused by the court and five other persons were impaneled as members of said Grand Jury, and they thereafter participated in its proceedings; said persons did not hear all of the evidence on which the indictment herein was purportedly based and did not hear the evidence introduced prior to their impanelment; at the time of impaneling said new members The Court further advised the Grand Jury that in order that the new members of the Grand Jury might become fully acquainted with those matters which had been begun but not yet

finished by said Grand Jury, that it would be well for said Grand Jury to bring to the attention of the new members of said Grand Jury all those matters which had been brought to the attention of the previous panel, and which they had already undertaken to investigate but which were not yet finished. Thereupon the Grand Jury was permitted to retire to the Grand Jury Room."

In addition to said five members added to said Grand Jury in the midst of its investigations, one member of said Grand Jury was excused from its deliberations for a period of sixty days.

2. Said Grand Jury was sworn and impaneled on November 6, 1940, and the indictment herein was voted on May 29, 1941. Twenty-one Grand Jurors were present at the session of May 29, 1941, at which said indictment was voted. Eighteen of said Grand Jurors voted for said indictment, and two of them were absent from said session of May 29, 1941, and did not vote.

3. Said twenty-one Grand Jurors who were present at said session of May 29, 1941, included the five substitute Grand Jurors who were added to said Grand Jury by order of this court and sworn and impaneled as members of said Grand Jury on March 4, 1941.

4. Of said twenty-one Grand Jurors only five were present at every session of said Grand Jury, and all of the remaining sixteen were absent for varying and substantial periods of time and did not hear a substantial amount of the evidence presented to said Grand Jury.

5. The number of absences from the sessions of said
195 Grand Jury among said twenty-one Grand Jurors present at said session at which the indictment herein was voted are as follows:

Number of jurors	Sessions absent	Approximate percentage of sessions absent	Number of jurors	Sessions absent	Approximate percentage of sessions absent
1	24	48	1	9	18
2	23	46	1	7	14
2	22	44	1	6	12
1	16	32	3	3	6
1	11	22	5	1	2

6. Less than twelve qualified persons who served on said Grand Jury concurred in the finding of said indictment.

7. There were less than twelve of said Grand Jurors who were not absent during a substantial number of the sessions held by said Grand Jury for the consideration of said indictment.

8. Each of said five substitute Grand Jurors who were sworn and impaneled as aforesaid participated in the hearings and delibera-

tions and voted on the indictment herein. None of them was summoned for such service as Grand Jurors after the end of the term for which the Grand Jury was originally summoned, in that prior to March 2, 1941, each of them was personally served by the marshal of this court with process commanding his appearance before this court for such service, all in violation of the Act of April 17, 1940, chapter 101 (U. S. C. 28: 421).

9. There were less than sixteen legally authorized and qualified members of said Grand Jury present at eleven of the sessions thereof at which evidence was presented which related to the subject matter of the indictment herein and upon which said indictment was based.

10. Said five substitute Grand Jurors participated in sessions of said Grand Jury and were unauthorized persons present in the Grand Jury Room.

196 11. Said Grand Jury was not a Grand Jury within the meaning of the Constitution and statutes of the United States.

12. Said purported indictment is not an indictment or an information and was not returned as a result of any proceeding authorized by the Constitution and laws of the United States whereby a defendant can be held to answer for an offense against the United States.

13. Said indictment was irregularly and unlawfully returned by reason of the facts herein stated, and or apparent on the face of the record, and for the following reasons, severally and collectively:

(a) A substantial number of the members of said Grand Jury did not hear a substantial part of the evidence on which said indictment was returned;

(b) Said last mentioned members were admonished as aforesaid by the court;

(c) By said admonition said last mentioned members were authorized and directed by the court to consider in the deliberations of said Grand Jury hearsay statements in lieu of evidence;

(d) By said admonition said last mentioned members were authorized and directed by the court to consider in the deliberations of said Grand Jury unsworn statements in lieu of evidence;

(e) By said admonition said members were authorized by the court to act upon said indictment notwithstanding that they did not hear a substantial part of the evidence;

(f) The proceedings before the Grand Jury constitute a judicial inquiry; to act upon evidence is of the essence of a judicial inquiry;

nothing can be treated as evidence in a judicial inquiry which is not introduced as such;

(g) Said proceedings of said Grand Jury were contrary to elementary standards of fairness and reasonableness necessary to constitute due process of law;

197 (h) More than twenty-three persons participated as Grand Jurors in the deliberations of the said Grand Jury;

(i) Said Grand Jury was not a Grand Jury within the meaning of the Constitution and statutes of the United States;

(j) Said purported indictment is not an indictment nor an information and was not returned as a result of any proceeding authorized by the Constitution and laws of the United States whereby a defendant can be held to answer for an offense against the United States;

(k) The summoning and impaneling of such five other persons as members of said Grand Jury on March 4, 1941, was not authorized by law or by any statute of the United States, and particularly not by section 284 of the Judicial Code, as amended April 17, 1940 (54 Stat. 110; U. S. C. 28:421), inasmuch as only four members of the Grand Jury were excused after the end of the term for which the Grand Jury was originally summoned, or at any other time, and five other persons were summoned and impaneled on March 4, 1941, as the result whereof unauthorized persons were present in the Grand Jury Room at the sessions of said Grand Jury;

(l) The summoning and impaneling of such five additional persons and the continuance of said Grand Jury into the March, 1941, term was beyond the jurisdiction of the court.

14. If this defendant is held to answer under said indictment, then, for the reasons herein stated, severally and collectively, this defendant would be held to answer herein contrary to and in violation of the rights and privileges of such defendant under the Fifth Amendment to the Constitution of the United States.

15. Insofar as any of said proceedings of or connected with said Grand Jury may purport or be claimed to be justified by

198 any statute of the United States, and particularly by section 284 of the Judicial Code, as amended April 17, 1940 (54 Stat. 110; U. S. C. 28:421), such statute, for the reasons herein stated, severally and collectively, is contrary to and in violation of the rights and privileges of this moving defendant under the Constitution of the United States, particularly the Fifth Amendment thereto.

16. Said indictment is not sufficient in law to require this defendant to plead thereto.

17. Said indictment does not state facts sufficient to constitute a crime or offense against the United States.

18. Said indictment does not state facts with sufficient accuracy and particularity to inform this defendant of the offense charged against it.

19. Said indictment is so vague, general, and indefinite that this moving defendant, although placed in jeopardy herein, would not be protected from a second prosecution for the same alleged offense.

Said motion will be based upon all of the records, papers and files herein of the above-entitled court relative to this cause and to all proceedings herein referred to and to all proceedings of said alleged Grand Jury and its proceedings, including, without limitation, the minutes of this court, and as part thereof, the documents hereto attached, marked "Exhibit A" and Exhibit A hereto, part of the records of this court, the reporter's transcript of all proceedings in open court herein, the attendance record of the said alleged Grand Jury, the record of the return of service of process on all of the alleged Grand Jurors, and particularly the above referred to substituted five Grand Jurors, showing that each of the latter was summoned prior to March 2, 1941, to wit, on February 27, 1941, February 28, 1941 and March 1, 1941, this notice of motion and memorandum of authorities filed in support hereof, and the memoranda of authorities heretofore filed herein
199 by other defendants herein, and all other records, papers, and files herein, including stipulations.

In the event of denial of said motion, this defendant respectfully excepts and reserves an exception.

Dated at San Francisco, California, August 21st, 1941.

ARTHUR B. DUNNE,
Attorney for Defendant, Carnation Company.

ORDER SHORTENING TIME

Good cause appearing therefor, the time for service of the foregoing Notice of Motion is shortened so that service thereof may be made at any time prior to 10 o'clock A. M., of Twenty-second day of August, 1941.

MICHAEL J. ROCHE,
District Judge.

[Citation of authorities omitted.]
[Endorsed:] Filed, August 21, 1941.
[Exhibit, Ante, P. 38, et. seq.]

In United States District Court

Order re motions to quash indictment and pleas in abatement

Friday, August 22, 1941—July 1941 term

Before Honorable MICHAEL J. ROCHE, District Judge

No. 27257–R

UNITED STATES OF AMERICA

vs.

EVAPORATED MILK ASSOCIATION, ET AL

The Motions of certain defendants to Quash Indictment;
200 the Pleas in Abatement on behalf of certain defendants; the Demurrer to Pleas in Abatement; and the Motion of the defendant Carnation Company to Quash Indictment, came on this day to be heard.

Thereupon the defendant Carnation Company, through Arthur B. Dunne, Esq., its Attorney at Law and in fact, was duly arraigned on the Indictment herein. After hearing Mr. Dunne, it is ordered that this case as to the defendant Carnation Company be continued to September 22, 1941 to plead.

After argument by Eugene M. Prince, Arthur B. Dunne and Walter H. Olds, Esqrs., in support of said Motions to Quash Indictment and Pleas in Abatement, and after argument by Charles S. Burdell, Esq., Special Attorney for the United States, in opposition thereto, the said Motions to Quash Indictment and Pleas in Abatement were submitted to the Court for consideration and decision, and the same being fully considered, It is ordered, that the Motions of certain defendants to Quash Indictment be and the same are hereby Denied; that the motion of the defendant Carnation Company to Quash Indictment be and the same is hereby Denied; and that the Pleas in Abatement of certain defendants be and the same are hereby Overruled; and that the defendents and each of them be and they are hereby allowed an exception to the ruling of the Court:

[Plea on behalf of Carnation Company omitted. Printed side page 63, ante.]

213 [Notice of Motion for Disclosure by Carnation Company. Omitted. Printed side page 119, ante.]

218 Dated: San Francisco, California, August 29, 194..

ARTHUR B. DUNNE,

Attorney for Defendant, Carnation Company.

[Endorsed:] Filed, August 29, 1941.

[Memorandum of authorities omitted.]

In United States District Court

Affidavit of Arthur B. Dunne

STATE OF CALIFORNIA,
City and County of San Francisco,
In the Above District and Division, ss.:

Arthur B. Dunne, being first duly sworn, deposes and says:

I am an attorney-at-law licensed to practice in all the Courts of the State of California, and in the above entitled Court. As such I am the attorney for Carnation Company, a Delaware corporation, one of the defendants in the above entitled cause. As such attorney I make this affidavit on behalf of said Carnation Company, for the reasons that the matters herein stated are known to me from an examination of the records of the above entitled Court, for the reason that Carnation Company is not present in the State of California or in the above District, and is absent from the County in which I have my office, and for the reason that said Carnation Company has no officer in the State, District or County. None of said matters are known to Carnation Company or its officers, and could not be learned by
219 them, or any of them, within the period within which this affidavit is to be filed.

The following proceedings were had in the above entitled Court, Honorable A. F. St. Sure, United States District Judge, a Judge of said Court, presiding, as appears from the Minutes of said Court: On October 24, 1940, in the matter entitled "In the Matter of the Drawing From the Jury Box the Names of 50 Persons to Serve as Grand Jurors for the November 1940 Term of this Court.", it appeared that there were seven hundred seventy-six (776) names in the Jury Box, and it so appearing "the Court ordered that the Clerk of this Court forthwith draw from said Jury Box the names of fifty (50) persons, said persons to appear for service as Grand Jurors for the Northern District of California, at San Francisco, during the November 1940 Term of this Court". At said time and on said occasion said Court ordered that a venire issue in respect of said persons "for their presence accordingly". Said venire was made returnable on November 4, 1940. On November 4, 1940, in the said matter of the selection of a Grand Jury for the November 1940 Term of the above entitled Court, only twenty-two (22) persons were found available, and it was ordered that five (5) more names be drawn from the Jury Box and the said persons so selected summoned, and the matter was continued until November 6, 1940. On November 6, 1940, after due proceedings in that behalf, a Grand Jury of twenty-three (23) persons was selected and impaneled

for the November 1940 Term. The proceedings on said day were entitled: "In the Matter of the Impanelment of a Grand Jury for the November 1940 Term of this Court."

Thereafter Frank J. Hennessy, United States Attorney for the Northern District of California, and Tom C. Clark and Charles C. Pearce, Special Assistants to the Attorney General of the United States, on February 25, 1941, prepared an application to the above entitled Court. A copy of said application is hereto annexed as Exhibit A, and made a part hereof. Said
220 application was presented to the above entitled Court on or before February 26, 1941, as hereinafter more fully appears, and thereafter, and on February 28, 1941, was filed in the office of the Clerk of the above entitled Court, and by said Clerk endorsed as filed on said day, as appears from Exhibit "A" hereto.

The Minutes of the above-entitled Court show that the following proceedings were had in Open Court on Wednesday, February 26, 1941: On said day the Grand Jurors for the Northern District of California, for the November 1940 Term of the above entitled Court came into Court at 11:10 A. M. Twenty (20) answered to their names and were found to be present, and the Foreman thereupon presented five (5) true bills or indictments, which were ordered filed. Robert M. McMillan, Esq., Assistant United States Attorney, and Charles C. Pearce, Esq., Special Assistant to the Attorney General, were present for and on behalf of the United States. "The Court advised the Grand Jury that United States Attorney and the Special Assistant to the Attorney General had made a joint application to the Court for an order extending the existence of the Grand Jury into the March 1941 Term of this Court, solely for the purpose of completing certain investigations begun but not yet finished. The Court advised the Grand Jury that he would enter an order on February 28, 1941, authorizing said Grand Jury to continue to sit during the succeeding March 1941 Term of this Court, solely to finish investigations begun but not finished by said Grand Jury." Thereupon the Foreman informed the Court that one Grand Juror had died during the November 1940 Term, and that four other Grand Jurors desired to be excused, and certain proceedings in that behalf were taken, and the Court advised three of said Grand Jurors that good cause having been shown, they would be excused on March 4, 1941, and that the Court would then make an order excusing one other Grand Juror. The Foreman informed the Court the Grand Jury would con-
tinue deliberations on February 26, 1941, at two o'clock
221 P. M., and on February 27, and 28, 1941. The Grand Jury was permitted by the Court to adjourn at the conclusion of its session on February 28, 1941, until Tuesday, March 4, 1941, at two o'clock P. M., and was directed to re-convene at the court

room at said last mentioned time, and the Court indicated that at said time he would excuse four Grand Jurors and impanel five other persons to take the place of the deceased Grand Juror and the said excused Grand Jurors. The Court ordered that a venire issue for twenty (20) persons to serve as Grand Jurors in the place and stead of said deceased Grand Juror and the said Grand Jurors excused, and the names of twenty (20) persons were drawn from the Jury Box accordingly.

On February 27, 1941, the above-entitled Court adjourned to "Friday, February 28, 1941, at 10 A.M.", and on Friday, February 28, 1941, the above entitled "Court met pursuant to adjournment". The first entry in the Minutes of said Court for February 28, 1941, is as follows: "In the Matter of the Continuing of the Present November 1940 Term Grand Jury to the March 1941 Term of this Court. Upon consideration of the petition of Honorable Frank J. Hennessy, United States Attorney, it is ordered that the present 1940 Term Grand Jury now sitting in this Division and District be, and it is hereby, authorized to continue to sit during the March 1941 Term of this Court for the sole purpose of finishing investigations begun but not finished by it during said November 1940 Term of this Court; in accordance with signed order this day filed." On February 28, 1941, the above entitled Court rendered, made and filed its written order, a copy of which is hereto attached, marked Exhibit B, and herein incorporated as fully as though herein set forth at length.

Said Grand Jury convened and met on February 27, 1941, and February 28, 1941; and then adjourned and did not meet again until 2 P. M. on March 4, 1941. At said last mentioned time,
222 after proceedings in that behalf, four members of said Grand Jury were excused and the Court selected and impaneled five new Grand Jurors, and "the Court advised the Grand Jury that they should continue their investigation of the matters being presented to them as expeditiously as possible, sitting, if necessary, three days a week to complete the investigations as early as convenient. The Court further advised the Grand Jury that in order that the new members of the Grand Jury might become fully acquainted with those matters which had been begun but not yet finished by said Grand Jury, that it would be well for said Grand Jury to bring to the attention of the new members of said Grand Jury all those matters which had been brought to the attention of the previous panel, and which they had already undertaken to investigate, but which were not yet finished. Thereupon the Grand Jury was permitted to retire to the Grand Jury Room."

On March 5, 1941, the Court excused for a period of sixty (60) days Mrs. Hattie H. Sloss, Grand Jury Foreman of said November 1940 Term Grand Jury.

On May 29, 1941, said Grand Jury, so continued, voted the indictment herein. On June 3, 1941, said indictment was returned to the above entitled Court and by it received and ordered filed, together with two other indictments returned at said time, and the following proceedings in respect of said November 1940 Term Grand Jury so continued were had: "Charles S. Burdell, Esq., Special Assistant to the Attorney General, advised the Court that the investigations which this Grand Jury was directed to complete had been concluded. Thereupon, after appropriate remarks by the Court and the Foreman, It Is Ordered that the Grand Jury for the November 1940 Term of this Court be discharged from further attendance upon the Court. Said Grand Jurors thereupon retired." Said November 1940 Grand Jury, so continued, was thereupon and then and there discharged and ceased to exist as a Grand Jury, and its business and functions were con-
223 cluded and there are now no matters pending before the November 1940 Term Grand Jury of the above entitled Court, nor is there any such Grand Jury.

All of the matter quoted above in this affidavit is quoted from the Minutes of the above entitled Court.

On August 6, 1941, and in the above entitled Court and cause, certain proceedings were had upon motion of certain of the defendants herein that disclosure be made. Upon said proceeding certain of the defendants herein were represented by Mr. Prince, and the United States of America was represented by Mr. Burdell, among other attorneys. Thereupon the following proceedings were had, as appears from the Reporter's Transcript of said proceedings:

"Mr. PRINCE. * * * It is my understanding that the Government states as a fact that the investigation was begun shortly after November 6—in any event begun during the November Term—there is no question about that, Mr. Burdell? The indictment so states.

"Mr. BURDELL. No; there is no question about that.

"The COURT. All right."

Thereafter, and on August 22, 1941, the following proceedings were had in the above entitled Court and in the above entitled cause: Affiant, appearing for Carnation Company, one of the defendants herein, made reference to the stipulation on file entered into between the United States of America, by certain of its attorneys, and Carnation Company, by affiant as its attorney, in respect of discoveries heretofore made, and stated: "If facts different from those disclosed on August 6, 1941, are to be disclosed and an issue to be raised, we want to reserve the right to enter into that

issue and find out whether in truth and in fact such an investigation was made in good faith in the November 1940 Term or not."

In the course of the discussion which followed the Court
224 stated, addressing itself to Mr. Burdell, one of the attorneys for the United States of America: "You come in this morning and say there has been some mistake about when this investigation was begun, and that is a factual situation which I understand we are discussing now." Thereafter, in the course of the discussion which followed, said Burdell, in respect of pleas theretofore filed by cetrain defendants herein, stated, in part: "Now, under the facts as stated in the plea there need not be any general denial, because the plea simply states that certain of the Grand Jurors were absent from a number of the sessions of the Grand Jury. Now, that may be entirely true. The fact is the investigation did not begin until a subsequent date in the November Term, therefore this question will be immaterial, therefore it is not necessary to deny that allegation. * * * We made the disclosures as best we could from the facts available here in Open Court, and at that time, not knowing what motions were going to be filed, I was not anticipating then, as I was a few minutes ago; not knowing what motions were going to be filed, we thought that was a satisfactory disclosure. Now, if that was not satisfactory, * * * it seems to me that they cannot complain when I come in here, after I find out what they are doing, and simply attempt to set them right on the matter." The following then occurred.

"The COURT. Very well, proceed to do so.

"Mr. BURDELL. The investigation commenced on or about February 28th."

Mr. Burdell further stated that he was the one who had presented the matter to the Grand Jury, and said: "I was present at every Grand Jury session, Your Honor, when matters relating to this indictment were presented." Thereupon the following occurred:

"The COURT. What was the first date that any testimony was taken before the Grand Jury, if you know?

"Mr. BURDELL. February 28, 1941."

225 Thereafter the following occurred:

"Mr. BURDELL. That is just what I am about to do. By order of Your Honor I was able to get the Grand Jury Minutes at recess. Now, on February 28th—now, I have before me the minutes of the Grand Jury dated February 28th. In these minutes the following recitation appears: 'Minutes of the previous meeting read and approved, as corrected (see below).'

"Then below it says: 'The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evapo-

rated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun.'

"These refer back to the February 27 minutes, so, as I understand these minutes of the Grand Jury the investigation was begun on February 27. Would the Court like to see these minutes? I will be glad to hand them to Your Honor.

"The COURT. I am not interested in them.

"Mr. BURDELL. Might they be made part of the record, Your Honor?

"The COURT. Very well.

"Mr. BURDELL. Might we make just the minutes of February 27 and 28 a part of the record, Your Honor? I see no reason for disclosing any others.

"The COURT. That would be better.

"Mr. BURDELL. I will now read in the minutes of the Grand Jury dated February 28, 1941: 'Special meeting of the Federal Grand Jury held this day, Foreman Mrs. Hattie H. Sloss, presiding. Minutes of previous meeting read and approved as corrected (see below) Special Assistant to the Attorney General Charles C. Pearce and Special Assistant Charles S. Burdell continued the presentation of the investigation of the peach industry for violation of the Sherman Anti-Trust Act. There being no further business the meeting adjourned." Signed, I think it is 'C. N. Alexander, Secretary', and 'Approved Eva L. Gibson, Foreman, pro tem.'

226 "Then below the following appears: 'The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun. Other industries named as subject to investigation are Salmon industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried Fruits, and a certain Labor Union with headquarters or located in Oakland. Asparagus and Cherries.'

"Mr. PRINCE. Does that record show the time and place of the meeting?

"Mr. BURDELL. No.

"Mr. PRINCE. Did you read the whole thing?

"Mr. BURDELL. I read the whole thing."

All of the proceedings of the said November 1940 Term Grand Jury were and are secret, except as disclosed as hereinabove stated, and except as so stated neither affiant nor defendant Carnation Company has any knowledge of what proceedings were had by or

before said Grand Jury in respect to this defendant, any other defendant named in the indictment herein, any matter referred to in the indictment herein, any investigation, or any investigation of the canned or evaporated milk industry, and none of said matters can be ascertained by affiant or defendant Carnation Company unless the Court order the same disclosed to said defendant. Said information is necessary in order to enable Carnation Company to sustain its plea and its plea in abatement herein in the event of a traverse or denial of any allegation thereof, and it is necessary in order to enable defendant Carnation Company to ascertain whether any investigation culminating in the indictment herein, or any investigation of the canned and evaporated milk industry, or of this defendant, or of any defendant named in the indictment herein, or of any matter referred to in the indictment herein, was

227 begun prior to the termination of the November, 1940 Term of the above entitled Court, and, if so, whether, prior to that time, any evidence, or any substantial evidence in the premises, was presented to said Grand Jury, and defendant Carnation Company is unable to ascertain whether any investigation hereinabove referred to was begun on or before February 28, 1941, or February 27, 1941, or February 26, 1941, or February 25, 1941, or whether any investigation in respect of any matter herein referred to, or of the canned and evaporated milk industry, or this defendant, or any defendant named in the indictment herein, or any matter referred to in the indictment herein, was begun by said November 1940 Term Grand Jury within the meaning of § 284 of the Judicial Code as amended (54 Stats. 110; 28 U. S. C. § 421) prior to the expiration of the November 1940 Term of the above entitled Court, or before February 28, 1941, or February 27, 1941, or February 26, 1941, or February 25, 1941. Without disclosure in the premises this defendant is unable to ascertain whether any of the Grand Jurors who voted for the indictment here did so without hearing a substantial portion of the evidence introduced before said Grand Jury in respect to the matters referred to in the indictment herein, or did so without hearing a portion of relevant and material evidence so introduced.

ARTHUR B. DUNNE.

Subscribed and sworn to before me this 29th day of August, 1941.

[SEAL] KATHRYN E. STONE,
Notary Public,
In and for the City and County of
San Francisco, State of California.

My commission expires March 15, 1945.

[ENDORSED:] Filed, August 29, 1941.

228 [Petition to extend time of Grand Jury omitted. Printed side page 89, ante.]

229 [Order authorizing continuance of Grand Jury omitted. Printed side page 90, ante.]

230 In United States District Court

Demurrer of defendant Swift & Company to the indictment

Defendant Swift & Company demurs to the indictment and to each count therein on the following grounds:

I

The indictment does not state facts sufficient to constitute any offense by this defendant against the United States.

II

Count One of the indictment does not state facts sufficient to constitute any offense by this defendant against the United States.

III

Count One of the indictment does not state facts sufficient to constitute any offense by this defendant under Section 1 of the Act of Congress of July 2, 1890, known as the Sherman Anti-trust Act.

IV

Count Two of the indictment does not state facts sufficient to constitute any offense by this defendant against the United States.

V

Count Two of the indictment does not state facts sufficient to constitute any offense by this defendant under Section 3 of the Act of Congress of July 2, 1890, known as the Sherman Anti-trust Act.

231 VI

A. Count One of the indictment is vague, indefinite and uncertain to such an extent that this defendant is not advised of the nature of the charges against it so that it may properly prepare and submit defenses thereto, and the facts stated are not sufficient to notify this defendant of the nature of the accusations for which it is now sought to be placed on trial, as required by the Sixth Amendment to the Constitution of the United States.

B. Count One of the indictment is vague, indefinite and uncertain in this, that it is not stated therein nor can it be ascertained therefrom:

1. Whether this defendant is charged as a manufacturer of evaporated milk or as a jobber (the allegations on this subject appearing in Paragraph 9 of the indictment).

2. Whether the defendant is charged with being engaged in business, either as a jobber or as a manufacturer of evaporated milk, directly or through a subsidiary or affiliate; and if charged with being engaged in such business through a subsidiary or affiliate, the name thereof and how this defendant is chargeable with the activities of such subsidiary or affiliate (the allegations on this subject appearing in Paragraph 9 of the indictment).

3. Whether it is charged that the acts, deeds or transactions charged against this defendant were done or ordered by its officers, agents or employees or by a subsidiary or affiliate, and if, by a subsidiary or affiliate the name thereof, and how this defendant is chargeable with the activities of such subsidiary or affiliate (the allegations on this subject appearing in Paragraph 11 of the indictment).

232 VII

A. Count Two of the indictment is vague, indefinite and uncertain to such an extent that this defendant is not advised of the nature of the charges against it so that it may properly prepare and submit defenses thereto, and the facts stated are not sufficient to notify this defendant of the nature of the accusations for which it is now sought to be placed on trial, as required by the Sixth Amendment to the Constitution of the United States.

B. Count Two of the indictment is vague, indefinite and uncertain in the following respects:

1. For the same reasons and specifications stated in Paragraph VI, subdivision B above, with respect to Count One.

2. It being alleged that this defendant is not a member of the Evaporated Milk Association and that substantially all evaporated milk sold in Alaska and Puerto Rico is sold by members of the Evaporated Milk Association, it does not appear nor can it be ascertained how or in what way this defendant has combined or conspired to fix or maintain or has fixed or maintained prices of evaporated milk sold and distributed from states of the United States to purchasers in the territories of Alaska and Puerto Rico.

VIII

Count Two of the indictment is defective for repugnancy in this: It purports to charge that this defendant combined and con-

spired with others for the purpose of fixing the price of evaporated milk sold and distributed from states of the United States to purchasers in the territories of Alaska and Puerto Rico and of maintaining said prices at artificial and noncompetitive levels, and that it has fixed and maintained said prices, whereas at the same
233 time it alleges that defendant Swift & Company is not and has not been engaged during the period covered by the indictment in selling evaporated milk to purchasers in the territories of Alaska and Puerto Rico.

WHEREFORE, this defendant prays that this demurrer be sustained and the indictments be dismissed, and that the defendant be hence dismissed by the Court.

HERMAN PHLEGER
MAURICE E. HARRISON,
BROBECK, PHLEGER & HARRISON,
T. L. SMART,
Attorneys for Defendant Swift & Co.

[Endorsed:] Filed, September 8, 1941.

[Plea on behalf of certain defendants omitted. Printed side page 80 ante.]

241 In United States District Court

Notice of Motions for Order Directing Compliance With Court's Order of August 6, 1941, and for Other Relief

To United States of America and to its attorneys herein, namely, THURMAN ARNOLD, *Assistant Attorney General;* FRANK J. HENNESSY, *United States Attorney;* TOM C. CLARK and M. S. HUBERMAN, *Special Assistants to the Attorney General;* LAWRENCE P. SHERRY; CHARLES S. BURDELL; FRED S. GILBERT, JR., and JOSEPH L. AMOTO, *Special Attorneys:*

Please take notice that on Monday, September 22, 1941, in the courtroom of the above entitled court, in the Post Office Building, San Francisco, California, at the hour of 10:00 A. M., or as soon thereafter as counsel can be heard, all the defendants who have heretofore appeared in the above entitled case, except Carnation Company, a corporation, including without limitation each and every defendant present in court herein in person or by attorney on August 6, 1941, and each of said defendants, severally and separately, will move the court:

1. For an order directing disclosure of the date on which the investigation began, which culminated in the indictment herein, such disclosure to be made in accordance with the court's order of August 6, 1941, granting disclosure, and on such terms and by

such persons having personal knowledge as the court shall deem proper, and such disclosure to include the date on which evidence was first taken with respect to said indictment, and to include other facts material in that behalf.

242 2. For such other relief as may be meet and proper in the premises.

Said motion will be based upon the following grounds, severally and collectively:

1. These defendants heretofore moved the court for an order addressed to said attorneys for the United States, or to any other person having such information, requiring disclosure of the date on which the investigation began which culminated in said indictment. On August 6, 1941, the court granted said motion.

2. Said order has not been complied with. Said date has not been disclosed, but the record contains inconsistent and conflicting statements thereof by counsel for the United States.

3. Said date is material for these reasons (among others): Unless said investigation was begun during the November 1940 term of court, then by virtue of the Act of April 17, 1940 (U. S. C. 28:421) (1) this court had no jurisdiction to authorize said grand jury to continue to sit during the March 1941 term of court, (2) said jury had no jurisdiction or authority to return or file said indictment against any of said defendants, and (3) this court has no jurisdiction to entertain any proceeding against any of said defendants based on said indictment.

This motion will be made upon all the records and files of the above entitled court relating to this cause, and to the proceedings of said grand jury, including without limitation this notice of motion, memorandum of authorities filed herewith, the minutes and orders of this court, reporter's transcripts of proceedings in open court, and the affidavit of Eugene M. Prince attached hereto and filed herewith.

Each of said defendants respectfully reserves an exception

243 in the event of a denial of all or any part hereof.

Dated: San Francisco, California, September 12, 1941.

Pillsbury, Madison & Sutro; Eugene M. Prince; Morrison, Hohfeld, Foerster, Shuman & Clark; Herbert W. Clark; Brobeck, Phleger & Harrison; Maurice E. Harrison; Webb, Webb & Olds; Walter K. Olds, Willis I. Morrison, Lee M. Olds, Joseph A. Murphy, Nat Brown, J. Wesley Cupp, E. R. Hoerchner, W. E. Foley, James E. Foley, Attorneys, respectively, for Moving Defendants.

STATE OF CALIFORNIA,
City and County of San Francisco, ss.

Eugene M. Prince, being first duly sworn, deposes and says: He is an attorney at law and counsel for certain defendants in the above-entitled cause.

He has read the attached notice of motion.

On August 6, 1941, the court granted defendants' motion for disclosure and counsel for the United States purported to state in open court the date on which the investigation began which culminated in the indictment herein. On August 20, 1941,
244 counsel for defendants were first informed by counsel for the United States that the latter claimed said statements of August 6, 1941, to be inaccurate, and in open court on August 22, 1941, the said date was differently stated by counsel for the United States than it had been either on August 6 or on August 20, 1941. At all times until August 20, 1941, affiant relied upon the statements of counsel for the United States as made on August 6, 1941. By reason of the conflicting and inconsistent statements aforesaid, counsel for defendants do not know the date on which the investigation commenced, but affiant believes that, by reason of the grand jury minutes which were read into the record in the proceedings herein on August 22, 1941, said investigation was not begun within the November 1940 term of court.

The attached motion is noticed for the first motion day subsequent to August 22, 1941, upon which, according to affiant's information, the judge before whom said cause is pending will be present to hear the same.

EUGENE M. PRINCE.

Subscribed and sworn to before me this 12th day of September 1941.

[SEAL] CHALMER MUNDAY,
Notary Public in and for the City and County of San Francisco, California.

[Endorsed]: Filed, September 13, 1941.

245 In United States District Court

Demurrers of undersigned defendants, severally, to indictment

Comes now each of the undersigned defendants, severally, and each for itself or himself and not one for another or jointly, by their respective undersigned attorneys, and, not confessing any of the matters or things alleged or charged in the indictment in the above entitled cause to be true, says that the said indictment and each count thereof, and the matters and things therein contained,

in the manner and form as the same are therein stated and set forth, are not sufficient in law to require the said demurring defendants, or any of them, to plead to the said indictment or any count thereof or to answer the same, and that said indictment and each count thereof is not sufficient in law to sustain a judgment against said demurring defendants, or any of them; and each of said defendants severally demurs and objects to said indictment, and separately to each count thereof, and for grounds of demurrer states:

I

The first count of said indictment is not sufficient in law as aforesaid, in that:

A. Said count of said indictment does not state facts sufficient to constitute an offense against the United States and does not state facts sufficient to show the commission of any offense against the United States, or a violation of any law of the United States, by said defendants or any of them.

B. Said count of said indictment does not state facts sufficient to constitute an offense by said defendants, or any of them,
246 under Section 1 of the Act of Congress of July 2, 1890, known as the Sherman Antitrust Act.

C. Said count of said indictment is vague, uncertain and indefinite to such extent that the said defendants, and each of them, are not advised thereby of the nature of the charges against them or any of them so that they may properly prepare and submit defenses thereto, and no facts are stated sufficient to notify said defendants or any of them of the nature or cause of the accusation for which they are now sought to be placed on trial, as required by Article VI of the Amendments to the Constitution of the United States.

D. Said count of said indictment is vague, indefinite and uncertain as aforesaid in this, that it is not stated therein nor can it be ascertained therefrom:

(1) Whether, and to what extent, any acts of any of the defendants alleged in said indictment were required or sanctioned by the "Marketing Agreement for Evaporated Milk Industry" which was approved and executed by the Secretary of Agriculture, acting under the provisions of the Agricultural Adjustment Act, on May 31, 1935, and pursuant to the provisions of said Act was by said Secretary declared to be effective on and after 12:01 a. m., eastern standard time, June 1, 1935, or by the "License for Evaporated Milk Industry" which was issued by the Secretary of Agriculture, acting under the provisions of the Agricultural Adjustment Act, on May 31, 1935, and declared by said Secretary

to be effective on and after 12:01 a. m., eastern standard time, June 1, 1935.

(2) Whether, and to what extent, the defendant Evaporated Milk Association was engaged in performing any services, other than the compiling and furnishing of periodic statistical data relating to production, stocks, shipments, sales, orders,
247 prices, distribution practices, freight rates, legislative matters, trade promotion, legal advice, sanitary standards, research, and educational promotion; and, with respect to the various services above listed, what was the nature thereof and whether and to what extent they related to past, future, or past and future transactions; and whether, and to what extent they were services required or sanctioned by the aforementioned "Marketing Agreement for Evaporated Milk Industry" or "License for Evaporated Milk Industry," or required to be obtained, compiled and disseminated by the "Managing Agent" of the "Manufacturers' Committee" appointed and constituted by virtue of the terms of said License.

(3) At what time or times each of the defendant companies was engaged in business as an evaporated milk manufacturer, and at what time or times each of said defendant companies (with the exception of Pet Milk Sales Corporation) was a member of defendant Evaporated Milk Association.

(4) At what time or times each of the defendant associations was engaged in promoting the interests of jobbers or retailers in the sale of evaporated milk or other commodities.

(5) What, if any, acts of any of the individual defendants constituted any offense charged in the indictment, and for whom, if anyone, any of said individual defendants acted in authorizing, ordering or doing any acts or things constituting any offense.

(6) To what extent trade or commerce in evaporated milk in the Pacific Coast territory or in the Territory of Alaska or Puerto Rico was controlled or dominated by the defendants or any of them.

(7) What was the nature of the combination or conspiracy of any of the defendants to fix prices of evaporated milk or to maintain prices at artificial or noncompetitive levels or to restrain trade or commerce in evaporated milk, and at what time or
248 times, at what place or places, to what extent, by what means and by what parties any such combination or conspiracy was entered into or effectuated.

(8) What, if any, prices were fixed or maintained, or sought to be fixed or maintained, pursuant to any such combination or conspiracy, and in what area, to what extent, upon what basis and with what intent were any prices so fixed or maintained or sought to be fixed or maintained; what is the meaning of the expression "artificial and noncompetitive" as used in the indictment.

(9) To what extent, if at all, any of such prices differed from those required or sanctioned by the aforementioned "Marketing Agreement for Evaporated Milk Industry" or "License for Evaporated Milk Industry."

(10) Whether any alleged restraint of trade or commerce in evaporated milk referred to in the indictment was reasonable or unreasonable.

(11) To what extent, if any, did any alleged restraint of trade apply to or affect trade or commerce among the several States of the United States.

(12) What was the nature of the means or methods used by the defendants, or any of them, to effectuate any of the purposes of any alleged combination or conspiracy.

(13) What was the nature of any discussions, determinations or agreements by any of the defendants upon prices to be charged for evaporated milk sold or distributed in the Pacific Coast territory, and at what time or times, at what place or places, to what extent, by what means and by what parties were any such determinations or agreements made; to what extent and by what parties was evaporated milk sold or shipped in interstate commerce at any prices alleged to have been agreed upon by the defendants or any of them.

249 (14) What was the nature of any agreements by any of the defendants with respect to the selling of "secondary" brands at differentials below the prices of "standard" brands, and at what time or times, at what place or places, to what extent, by what means and by what parties were any such agreements made; to what extent and by what parties was evaporated milk sold or shipped in interstate commerce in accordance with any price differentials alleged to have been agreed upon by the defendants or any of them.

(15) At what time or times, at what place or places, to what extent, by what means and through the action of what parties did the defendants or any of them cause or induce or attempt to cause or induce any evaporated milk manufacturers to sell or ship evaporated milk in interstate commerce at the prices or in accordance with the price differentials alleged to have been agreed upon by the defendants or any of them.

(16) What was the nature of any discussions, determinations or agreements by any of the defendants with respect to the prices to be charged by jobbers or retailers for evaporated milk sold in interstate commerce, and at what time or times, at what place or places, to what extent, by what means and by what parties were any such determinations or agreements made; at what time or times, at what place or places, to what extent and by what

means and through the action of what parties did the defendants or any of them coerce or induce or attempt to coerce or induce any jobbers or retailers to sell or distribute evaporated milk at the prices alleged to have been agreed upon by the defendants or any of them.

(17) At what time or times, at what place or places, to what extent, by what means, through the action of what parties and with what intent did the defendants or any of them agree
250 upon or follow the practice or policy or interchanging statistical data relating to evaporated milk; to what extent and by what means did any such alleged practice or policy aid the defendants or any of them in fixing or maintaining prices of evaporated milk in interstate commerce.

(18) To what extent and in what respects any statistical data alleged to have been interchanged among the defendants relating to evaporated milk was or was not data required or permitted to be so interchanged under the aforementioned "Marketing Agreement for Evaporated Milk Industry" or "License for Evaporated Milk Industry."

(19) What was the nature of any agreements or designations by any of the defendants with respect to any persons to whom or places at which the defendants or any of them would sell evaporated milk at jobber prices, and at what time or times, at what place or places, to what extent, by what means and by what parties were any such agreements or designations made.

(20) To what extent and by what means has any combination or conspiracy alleged in the indictment operated or been carried out within the Southern Division of the Northern District of California; what was the nature of any meetings held or prices fixed or sales made at such prices in said District and Division; and at what time or times, at what place or places, to what extent, by what means and through the action of what parties were any such meetings held or prices put into effect in said District and Division, or were any such sales made in said District and Division, by the defendants or any of them.

(21) Whether said count of said indictment charges or purports to charge the defendants or any of them with the offense of a combination and conspiracy (a) to fix or maintain prices of evaporated milk, (b) to cause or induce evaporated milk
251 manufacturers to sell or ship evaporated milk at such prices, (c) to fix prices to be charged by jobbers or retailers for evaporated milk and to coerce or induce such jobbers or retailers to sell or distribute evaporated milk at such prices, (d) to exchange statistical data among the defendants relating to evaporated milk, (e) to agree upon or designate the persons to whom

and the places at which the defendants would sell evaporated milk at jobber prices, or (f) generally to restrain trade or commerce in evaporated milk; or with the offense of entering into contracts of sale in restraint of trade; or with the offense or offenses of effectuating one or more restraints of trade of the character mentioned in the foregoing references to possible combination and conspiracy; or with all the aforementioned offenses.

E. Said count of said indictment attempts to charge that the defendants have engaged in an unlawful combination and conspiracy in restraint of trade, but nowhere sets forth facts showing wherein the defendants or any of them were so unlawfully engaged, and, therefore, the words of such charge are merely a conclusion of the pleader, and the purported statements of unlawful combination and conspiracy or of the fixing or maintenance of prices at artificial and noncompetitive levels are mere recitals or conclusions of law.

F. Said count of said indictment fails to allege with reasonable certainty the means by which said defendants or any of them entered into or engaged in any combination or conspiracy in restraint of trade and fails to allege with reasonable certainty the persons through whom or the times or places at which said defendants or any of them communicated, conferred or met together or fixed, determined or agreed upon any prices or conditions of sale; and the purported allegations of said count referring to persons "to the Grand Jurors unknown," means and meth-
252 ods "to the Grand Jurors unknown" and places "to the Grand Jurors unknown" are insufficient by reason of vagueness, uncertainty and indefiniteness.

G. Said count of said indictment is duplicitous in this, that said count charges or purports to charge more than one separate and distinct offense against the United States.

H. Said count sets forth or purports to set forth more than one offense in this, that said count alleges or purports to allege the separate offenses of combinations and conspiracies (a) to fix and maintain prices of evaporated milk, (b) to cause and induce evaporated milk manufacturers to sell and ship evaporated milk at such prices, (c) to fix prices to be charged by jobbers and retailers for evaporated milk and to coerce and induce such jobbers and retailers to sell and distribute evaporated milk at such prices, (d) to exchange statistical data among the defendants relating to evaporated milk, (e) to agree upon and designate the persons to whom and the places at which the defendants would sell evaporated milk at jobber prices, and (f) generally to restrain trade and commerce in evaporated milk; also the separate offense of entering into contracts of sale in restraint of trade; also the separate offenses of effectuating restraints of trade of the

character mentioned in the foregoing references to combinations and conspiracies.

I. The jurisdiction of the Secretary of Agriculture under the aforementioned "Marketing Agreement for Evaporated Milk Industry" and "License for Evaporated Milk Industry" is exclusive, and in the absence of a determination by the Secretary of Agriculture that the matters complained of in said count of said indictment were not necessary for the purpose of carrying out the provisions of said License, no prosecution will lie under the Sherman Antitrust Act.

253 II.

The second count of said indictment is not sufficient in law as aforesaid, in that:

A. Said second count is not sufficient upon the grounds severally specified in paragraphs A, C, D, E, F, G, H, and I herein above, setting forth grounds of demurrer to the first count of said indictment; and said defendants, and each of them, reassert each and all of said grounds as grounds of demurrer to, and with respect to, the second count of said indictment. In this behalf, the paragraphs aforesaid are hereby referred to and are incorporated in the demurrer of said defendants, and each of them, to the second count of said indictment to the same extent and with the same force and effect as if repeated in full herein.

B. Said count of said indictment does not state facts sufficient to constitute an offense by said defendants, or any of them, under Section 3 of the Act of Congress of July 2, 1890, known as the Sherman Antitrust Act.

C. Said count of said indictment is vague, indefinite and uncertain as aforesaid in this, that it is not stated therein nor can it be ascertained therefrom:

(1) To what extent, if any, did any alleged restraint of trade apply to or affect trade or commerce in the Territory of Alaska or Puerto Rico or between either of said Territories and States of the United States.

(2) What was the nature of any discussions, determinations or agreements by any the defendants upon prices to be charged for evaporated milk sold or distributed to purchasers in the Territory of Alaska or Puerto Rico, and at what time or times,

254 at what place or places, to what extent, by what means and by what parties were any such determinations or agreements made; to what extent and by what parties was evaporated milk sold or shipped from States of the United States to purchasers in either of said Territories at any prices alleged to have been agreed upon by the defendants or any of them.

(3) What was the nature of any agreements by any of the defendants with respect to the selling of "secondary" brands at differentials below the prices of "standard" brands, and at what time or times, at what place or places, to what extent, by what means and by what parties were any such agreements made; to what extent and by what parties was evaporated milk sold or shipped from States of the United States in accordance with any price differentials alleged to have been agreed upon by the defendants or any of them to purchasers in the Territory of Alaska or Puerto Rico.

(4) What was the nature of any agreements by any of the defendants upon uniform cash discounts to be accorded purchasers in the Territory of Puerto Rico, and at what time or times, at what place or places, to what extent, by what means and by what parties were any such agreements made; to what extent and by what parties was evaporated milk sold or shipped from States of the United States to purchasers in said Territory at any discounts alleged to have been agreed upon by the defendants or any of them.

255 (5) At what time or times, at what place or places, to what extent, by what means, through the action of what parties and with what intent did the defendants or any of them agree upon or follow the practice or policy of interchanging statistical data relating to evaporated milk; to what extent and by what means did any such alleged practice or policy aid the defendants or any of them in fixing or maintaining the price of evaporated milk sold or shipped from States of the United States to purchasers in the Territory of Alaska or Puerto Rico.

(6) Whether said count of said indictment charges or purports to charge the defendants or any of them with the offense of a combination and conspiracy (a) to fix or maintain prices of evaporated milk, (b) to agree upon uniform cash discounts to be accorded purchasers, (c) to exchange statistical data among the defendants relating to evaporated milk, or (d) generally to restrain trade or commerce in evaporated milk; or with the offense of entering into contracts of sale in restraint of trade; or with the offense or offenses of effectuating one or more restraints of trade of the character mentioned in the foregoing references to possible combination and conspiracy; or with all the aforementioned offenses.

D. Said count of said indictment is duplicitous in this, that said count alleges or purports to allege the separate offenses of combinations and conspiracies (a) to fix and maintain prices of evaporated milk, (b) to agree upon uniform cash discounts
256 to be accorded purchasers, (c) to exchange statistical data among the defendants relating to evaporated milk, and (d) generally to restrain trade and commerce in evaporated milk;

also the separate offense of entering into contracts of sale in restraint of trade; also the separate offenses of effectuating restraints of trade of the character mentioned in the foregoing references to combinations and conspiracies.

These demurrers are, and each thereof is, without prejudice to or waiver of any other motion, plea or proceeding on behalf of defendants or on behalf of any defendant interposing this demurrer.

Wherefore, each of said demurring defendants severally prays that this demurrer be sustained as to said indictment, and each count thereof, as to each and all of said defendants, and that said indictment and each count thereof be dismissed, and that said defendants and each of them be hence dismissed by the Court.

Dated: September 15, 1941.

Respectfully submitted.

Pillsbury, Madison & Sutro, Felix T. Smith, Eugene M. Prince, Francis R. Kirkham, Marshall P. Madison, Standard Oil Building, San Francisco, California, Attorneys for Defendants, Evaporated Milk Association, The Borden Company, Pet Milk Company, Pet Milk Sales Corporation, Libby, McNeill & Libby, Inc., Sego Milk Products Company, Armour and Co., of Delaware, Golden State Company, Ltd., Dan F. Stilling, William T. Nardin, A. W. Ramsdell, Earl L. Miller, Siegfried P. Harter, Ralph Wanzer, J. F. Valois, George Campbell, Frank E. Rice, William Henry, Philip G. Kinzer,
257 E. C. Portman; Morrison, Hohfeld, Foerster, Shuman, & Clark, Herbert W. Clark, Francis C. Hutchens, Crocker Building, San Francisco, California, Attorneys for Defendants, Evaporated Milk Association, Nestle's Milk Products, Inc., D. F. Norton, Jean N. Bistline, Dan F. Stilling, Frank E. Rice; Dunne & Dunne, Arthur B. Dunne, 333 Montgomery Street, San Francisco, California, Attorneys for Defendant Carnation Company; W. E. Foley, James W. Foley, 2000 The Alameda, San Jose, California, Attorneys for Defendant Central Coast Counties Association of Retail Grocers, Inc.; J. Wesley Cupp, Black Building, Los Angeles, California, Attorneys for Defendants, Food and Grocery Bureau of Southern California, Inc. and San Diego County Grocers' Fair Trade Practice Committee; Joseph A. Murphy, Latham Square Building, Oakland, California, Attorney for Defendant, Dairymaid Creameries, Ltd.; Lee M. Olds, 57 Post Street, San Francisco,

California, Attorney for Defendants, Meyenberg Milk Products Co., John P. Meyenberg, Jr., L. A. Humason; Webb, Webb & Olds, Walter K. Olds, Mills Tower, San Francisco, California; Willis I. Morrison, 215 West Fifth Street, Los Angeles, California, Attorneys for Defendants Russell S. Waltz, C. W. Hibbert, Challenge Cream and Butter Association, Milk Producers Association of Central California, Consolidated Dairy Products Co., G. H. Benikendorf; Nat Brown, C. H. Logan, Bank of American Bldg., Stockton, California, Attorneys for Defendants Morning Milk Company and George Lockhart; E. R. Hoerchner, Phelan Building, San Francisco, California, Attorney for Defendants, Foods Trade Institute, Central California Retail Grocers & Meat Dealers Association, Food Industry Bureau, Inc.

[Endorsed:] Filed, September 16, 1941.

258 [*Replications* Omitted. Printed side page 96-97 ante.]

259 In United States District Court

Order denying motions to direct compliance with court's order and motions for disclosure, and continuing case to December 3, 1941

Monday, September 22, 1941—July Term, 1941

Before Honorable MICHAEL J. ROCHE, District Judge

No. 27257-R

UNITED STATES OF AMERICA

vs.

EVAPORATED MILK ASSOCIATION ET AL.

* * * * *

After hearing the arguments of Arthur B. Dunn, Esq., Eugene M. Prince, Esq., Herbert W. Clark, and Moses Laskey on behalf of certain defendants, and Charles S. Burdell, Esq., on behalf of the United States, it is ordered that the Motions to Direct Compliance with the Court's Order be denied, and exceptions noted on behalf of all defendants. Further ordered that the Motions for Disclosure be denied and an exception noted.

It is further ordered that the Demurrers, Motions for Bills of Particulars and the matters of the pleas be continued to December 3, 1941.

It is further ordered that this case be continued to December 3, 1941, for trial of the Pleas in Abatement. (Jury.)

260 (The remainder of the foregoing Order refers to the arraignment of certain defendants and the admission of Patrick A. Geraghty, Esquire, to practice in this Court for this case only.)

In United States District Court

Order continuing case from December 3, 1941, to December 15, 1941

Saturday, November 15, 1941—November term, 1941

Before Honorable MICHAEL J. ROCHE, District Judge

No. 27257-R

UNITED STATES OF AMERICA

vs.

EVAPORATED MILK ASSOCIATION ET AL.

Upon motion of Wallace Howland, Esq., Special Assistant to the Attorney General of the United States, and good cause appearing therefor, it is ordered that all matters in this case now on the calendar for December 3, 1941, be and the same are hereby continued to December 15, 1941.

Notice of motion for leave to withdraw replications and to file motions to strike and demurrers to certain pleas in abatement omitted. Printed side page. 98 ante.

264 In United States District Court

Order of direction as to filing of briefs and continuing the hearing on pleas, motions, and demurrers, to January 26, 1942

Monday, December 15, 1941—November Term, 1941

Before Honorable MICHAEL J. ROCHE, District Judge

No. 27257-R

UNITED STATES OF AMERICA

vs.

EVAPORATED MILK ASSOCIATION ET AL.

* * * * * * *

Hearing on Demurrers and Motions for Bills of Particulars; setting of Pleas in Abatement; hearing on the Motion to

265 Withdraw Replications, Motion to file motions to Strike Certain Pleas in Abatement, and motion to file Demurrers to certain pleas in abatement.

Wallace Howland, Esq., Special Assistant to the Attorney General, was present for and on behalf of the United States. Herbert W. Clark, Arthur B. Dunne, Walter K. Olds, Joseph A. Murphy, James W. Foley, and Francis B. Kirkham, Esqrs., appearing as Attorneys for the Defendants for whom they have heretofore appeared herein.

After hearing Mr. Howland and Mr. Kirkham, it is ordered that the defendants have to and including January 12, 1942, within which to file their Brief in answer to the Brief of the United States, and that the United States have to and including January 19, 1942, within which to file its Brief in reply to the Defendants' Brief. After hearing Mr. Howland, Mr. Clark, and Mr. Kirkham, it is ordered that the matter of the arraignment of the defendants Oregon Trade Regulation Association and San Diego Country Grocers' Fair Trade Practice Committee; the entry of the pleas of certain defendants; the Demurrers and Motions for Bills of Particulars; the setting of the pleas in abatement for trial; the motion to withdraw replications; the motion to file motions to strike certain pleas in abatement and the motion to file Demurrers to certain pleas in abatement, be and the same are hereby continued to January 26, 1942.

(The remainder of the above Order refers to the arraignment and pleas of certain defendants.)

266 In United States District Court

Order continuing further argument on motions to withdraw replications, for leave to file motion to strike, for leave to file demurrers to pleas in abatement, until January 2, 1942

Monday, January 26, 1942—November Term, 1941

Before Honorable MICHAEL J. ROCHE, District Judge

No. 27257-R

UNITED STATES OF AMERICA

vs.

EVAPORATED MILK ASSOCIATION ET AL.

The motion for leave to withdraw replications to certain pleas in abatement; the motion for leave to file motions to strike certain pleas in abatement, and the motion for leave to file Demurrers to certain pleas in abatement, came on this day to be heard. Wallace Howland, Esq., Special Assistant to the Attorney General, appear-

ing as Attorney for the United States of America. Arthur B. Dunne, Herbert W. Clark, U. S. Webb, Walter K. Olds, Lee M. Olds, Moses Lasky, Joseph A. Murphy, E. R. Hoerchner, Francis R. Kirkham, Nat Brown, and J. Wesley Cupp, Esqrs., appearing as Attorneys for the defendants. After argument by Mr. Howland, it is ordered that the further argument on the motions for leave to withdraw replications, for leave to file motions to strike, and for leave to file Demurrers to pleas in abatement, be continued until January 28, 1942, at 10 o'clock A. M., and that the matter of the arraignment of the defendants Oregon Trade Regulation Association and San Diego County Grocers' Fair Trade Practice Committee; the matter of the entry of the pleas of the defendants, and the Demurrers and motions for bills of particulars be continued to January 28, 1942.

267 In United States District Court

Motions to strike and demurrer to certain pleas in abatement

Comes now the United States of America and pursuant to permission granted this day by this Honorable Court, moves to strike the following pleas in abatement hereinafter filed by certain defendants, to wit:

The First, Second, Third, and Fourth such pleas, and each of them, contained in the pleading entitled "Pleas on behalf of certain defendants" filed herein on September 13, 1941, by Messrs. Pillsbury, Madison & Sutro and associated counsel.

The Fourth Plea and the Fifth Plea, and each of them, contained in the pleading entitled "Plea on Behalf of Carnation Company" filed herein on August 29, 1941, by Arthur B. Dunne, Esquire.

Said motions to strike are made on the following grounds severally and collectively against each and every one of the aforesaid pleas in abatement, each of said grounds being hereby specified as a ground for each of said motions to strike against said pleas in abatement, to wit:

(1) The said pleas in abatement, and each of them, do not state sufficient facts with sufficient certainty, accuracy, and completeness to constitute valid pleas in abatement.

(2) The said pleas, and each of them, allege on knowledge or on information and belief, facts which the Court will take
268 judicial notice the pleaders cannot know of their own knowledge. (3) The said pleas, and each of them, are not well taken under the law as made and provided in such cases.

And the United States of America, with the permission of this Honorable Court aforesaid, now demurs to the First Plea, the Second Plea and the Third Plea, and each of them, contained in

the pleading entitled "Plea on behalf of Carnation Company" filed herein on August 29, 1941, by Arthur B. Dunne, Esquire, on the following grounds, the said grounds being hereby specified as applicable to each demurrer, to each of the aforesaid pleas in abatement, to wit:

(1) The said pleas in abatement, and each of them, do not state facts sufficient to constitute a valid plea in abatement.

(2) The said pleas in abatement, and each of them, are vague, indefinite, and uncertain to such an extent that the Government is not advised of the precise legal basis upon which such pleas are grounded.

THURMAN ARNOLD,
Assistant Attorney General.
FRANK J. HENNESSY,
United States Attorney.
TOM C. CLARK,
WALLACE HOWLAND,
Special Assistants to the Attorney General.

[Endorsed:] Filed, January 28, 1942.

269 [Orders granting motions to strike, sustaining demurrers to pleas, overruling demurrers to the indictment, setting time for the filing of briefs, and continuing motions for bills of particulars to February 12, 1942, omitted. Printed side page 127 ante.]

272 In United States Court of Appeals, Ninth Circuit

No. 10034

EVAPORATED MILK ASSOCIATION, ET AL., PETITIONERS

vs.

HONORABLE MICHAEL J. ROCHE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, RESPONDENTS

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable FRANCIS A. GARRECHT, Circuit Judge; Honorable WILLIAM HEALY, Circuit Judge.

Order directing reinstatement of pleas, etc.

March 4, 1942

Upon consideration of the petition for a writ of mandamus or other appropriate writ in this matter, and of the briefs and affidavits in support thereof, and of respondents' return to order

to show cause heretofore issued on said petition, and briefs in opposition to said petition, and good cause therefor appearing.

It is ordered that Honorable Michael J. Roche, Judge of the District Court of the United States for the Northern District of California, and the District Court of the United States for the Northern District of California, Southern Division, reinstate the petitioners' pleas to the jurisdiction of the Grand Jury to return the indictment and the jurisdiction of the said District Court over the cause, and to reinstate the replications of the United States of America to said pleas, and to set the issues raised thereby for jury trial.

273 In United States Court of Appeals for the Ninth Circuit

[Title omitted.]

Petition for stay and order thereon

Filed April 3, 1942

Come now the Respondents in the above-entitled cause and represent to this Honorable Court as follows:

Whereas, on March 4, 1942, an order was made by this court granting a writ of mandamus directed to the Respondent Court pursuant to a certain petition filed herein on January 28, 1942,

And whereas, the Respondents are desirous of petitioning this Honorable Court for a rehearing in this matter

Now, therefore, Respondents pray this Honorable Court as follows:

1. That permission be granted Respondents to file herein their said petition for rehearing in this matter.

2. That order issue from this Court directed to the Respondent Court requiring that all proceedings in response to the order of this Court made on March 4, 1942, be stayed until final
274 order of this Court on the petition for rehearing in this matter is made and entered.

3. That this Court further order that the time of the Respondent to apply for writ of certiorari or other relief from the order entered on March 4, 1942, shall commence to run only from the date of the entry of final order on the petition for rehearing in this matter is made.

Respectfully submitted.

Dated at San Francisco, California, this 3rd day of April 1942.

TOM C. CLARK,
Tom C. Clark,
WALLACE HOWLAND,
Wallace Howland,
Special Assistants to the Attorney General.

THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.
FRANK J. HENNESSY,
Frank J. Hennessy,
United States Attorney.

So ordered:

FRANCIS A. GARRECHT,
Circuit Judge.
WILLIAM HEALY,
Circuit Judge.

[File endorsement omitted.]

278 In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted.]

Petition for rehearing

Filed April 3, 1942

To the Honorable United States Circuit Court of Appeals for the Ninth Circuit:

Come now the respondents* in the above-entitled cause and respectfully present this, their petition for a rehearing on the petition for the writ of mandamus or other appropriate writ, filed herein on January 28, 1942, based upon the following grounds:

I

The Court has overlooked or has failed to understand material issues of law and of fact in construing the pleas of the petitioners as pleas to the jurisdiction of the court below; when 279 in law and in fact such pleas were merely pleas in abatement of the indictment.

II

In the order entered by this Court on March 4, 1942, this Court rendered a decision in conflict with the previously announced decisions of the Circuit Court of Appeals for the Seventh Circuit in Biemer v. United States, 54 F. (2d) 1045 (1932); with the previously announced decision of the Circuit Court of Appeals for the Fourth Circuit in Luxenberg v. United States, 45 F. (2d) 497 (1930); and with the previously announced decision of the Circuit Court of Appeals for the Eighth Circuit in Mounday, et

*Although the defendants below and original petitioners for writ of mandamus are technically respondents for the purposes of this petition for rehearing, they are herein designated as "petitioners" for the sake of uniformity of nomenclature in all the proceedings before this Court. Conversely the moving parties herein are designated as "respondents."

al., v. United States, 225 Fed. 965 (1915); as well as in conflict with the previously announced decision of this Circuit Court of Appeals in Cunningham v. Rodgers, 171 Fed. 835 (1909).

III

The order of this Court entered on March 4, 1942, decided the question before it in a way in conflict with the applicable decisions of the Supreme Court of the United States; among such Supreme Court decisions being: Piquignot v. The Pennsylvania Railroad Co., 57 U. S. 104 (1853); Stephens v. Monogahela Bank, 111 U. S. 197 (1884); Leitensdorfer et al. v. Webb, 20 How. 176, 186 (1857).

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IV

In its order entered on March 4, 1942, this Court has decided an important question of the general law governing appellate procedure in a way untenable and in conflict with the weight of authority; in conflict with previously announced decisions of the Supreme Court of the United States; and in conflict with previously announced decisions of other Circuit Courts of Appeal, by permitting a review and a reversal by application for and the issuance of the writ of mandamus to reverse rulings of the district court which this court is without jurisdiction to reverse on appeal.

302 Respectfully submitted.

Dated at San Francisco, California, this 3rd day of April 1942.

TOM C. CLARK,
Tom C. Clark,
WALLACE HOWLAND,
Wallace Howland,
Special Assistants to the Attorney General.

FRED S. GILBERT, JR.,
Fred S. Gilbert, Jr.
PIERCE W. BRADLEY,
Pierce W. Bradley,
LEONARD A. MARCUSSEN,
Leonard A. Marcussen,
Special Attorneys.

THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.

FRANK J. HENNESSY,
Frank J. Hennessy,
United States Attorney.

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The foregoing petition is believed to be well founded in point of law and has not been filed for purposes of delay.

WALLACE HOWLAND.
Wallace Howland,
Special Assistant to the Attorney General
and one of the Attorneys for Respondents.

303 In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted.]

Order on petition for rehearing

Filed May 4, 1942

Before WILBUR, GARRECHT, and HEALY, Circuit Judges

Petition for rehearing is granted.

The petition for the writ of mandamus will be heard by the court in bank, seven judges participating. We assume that the Attorney General will not press the case for trial while this application is pending before this court. It is assumed that, in the meantime, no action will be taken by the District Judge in the case other than a compliance with the writ of mandate heretofore ordered issued, if so advised. That is to say, the trial court will not proceed to the trial of the case on the merits until after the trial of the plea in abatement.

Both parties shall have ten days to file opening briefs, and each party to have five days to reply. Upon filing of the final brief the matter will be set down for hearing.

CURTIS D. WILBUR,
FRANCIS A. GARRECHT,
WILLIAM HEALY,
United States Circuit Judges.

Rehearing having been granted in the above entitled matter, I join with the three Judges in the foregoing order directing that the application be heard before the seven Circuit Judges of this court sitting in bank.

CLIFTON MATHEWS,
United States Circuit Judge.

[File endorsement omitted.]

304 In United States Circuit Court of Appeals for the Ninth Circuit

Before WILBUR, GARRECHT, DENMAN, MATHEWS, HANEY, STEPHENS, and HEALY, Circuit Judges

Order of submission on return to order to show cause

June 12, 1942

Ordered return to order to show cause on petition for writ of mandamus argued by Mr. Francis R. Kirkham, counsel for petitioners, and by Mr. Wallace Howland, Special Assistant to the Attorney General, counsel for respondents.

A recess was taken at 11:55 a. m.

The Court resumed hearing at 12:05 p. m.

Thereupon Mr. Kirkham continued his oral argument, and on motion of Mr. Howland leave is granted to respondents to file supplemental brief within five days from date, the matter thereupon to stand submitted.

305 In United States Circuit Court of Appeals for the Ninth Circuit

Before WILBUR, GARRECHT, DENMAN, MATHEWS, HANEY, STEPHENS, and HEALY, Circuit Judges

Order directing filing of opinion and dissenting opinions, etc.

Sept. 12, 1942

By direction of the Court, it is ordered that the typewritten opinion and dissenting opinions this day rendered by this court in above cause be forthwith filed by the clerk, and that the issuance of the writ of mandamus be, and hereby is stayed for a period of thirty days from date hereof in order that the lower court may proceed as indicated in the majority opinion rendered.

STEPHENS, C. J., not participating in decision.

306 In United States Circuit Court of Appeals for the Ninth Circuit

No. 10,034

EVAPORATED MILK ASSOCIATION, ET AL., PETITIONERS

vs.

HONORABLE MICHAEL J. ROCHE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, RESPONDENTS

Upon return to order to show cause on petition for writ of mandamus

Opinion

Sept. 12, 1942

Before WILBUR, GARRECHT, DENMAN, MATTHEWS, HANEY, STEPHENS, and HEALY, Circuit Judges

WILBUR, Circuit Judge:

The petitioners, having been indicted by a grand jury for a violation of the Sherman Antitrust Law, pleaded in abatement that the grand jury returning the indictment was drawn in the term previous to that in which they returned the indictment, and that the hearing before the grand jury upon which the indictment was based was not begun until after the expiration of the term in which the jury was impaneled.

The trial court struck out the pleas in abatement and was about to proceed with the trial of the case under plea of not guilty, when the petitioners applied to this court for a writ of mandamus to compel the trial court to hear the issues raised by their pleas in abatement. This court promptly granted a writ. The respondent filed a petition for rehearing, which was granted
307 and ordered heard before the seven Circuit Judges of this circuit sitting en banc.

The law provides that this court can issue a writ of mandamus to the District Court only when such writ is in aid of its appellate jurisdiction (28 U. S. C. A. § 377). The respondent insists that inasmuch as the statute expressly provides that there is no right of appeal from a decision of the trial court on a plea of abatement other than to the jurisdiction of the court (28 U. S. C. A. § 879),

the writ applied for in this case cannot be in aid of this court's appellate jurisdiction.[1] On the other hand, petitioners contend that the plea attacks the power of a grand jury to return an indictment and therefore was jurisdictional within the meaning of 28 U. S. C. A. § 879, supra. They further contend that 28 U. S. C. A. § 879, being derived from the Judiciary Act of 1789 (§ 22, c. 20, 1 Stat. 73, 84), does not apply to criminal cases as the original statute was concerned solely with civil actions. We find it unnecessary to discuss these questions because Congress, on the 9th day of May 1942, amended the law concerning criminal appeals by providing that the United States has a right of appeal from a decision of the trial court in a criminal case on a plea in abatement. (Public Laws 543, 77th Congress, ch. 295, 2d session.) This court is thereby given appellate jurisdiction over a decision of the trial court in the event that the decision is unfavorable to the government. The trial court, by striking out the pleas in abatement, makes it impossible for the decision of the trial court on the issues raised by the pleas to reach this court. The fact that the statute only permits an appeal from a judgment adverse to the government does not circumscribe our power to control the conduct of the trial court, for it may be when properly determined the decision of the trial court would be adverse to the government. The
308 effect of the decision of the trial judge striking out the pleas is to prevent the entry of an appealable judgment.

It is contended, by the respondent that the order of the trial court striking out the pleas of the petitioners was in effect an adjudication that the pleas did not state facts sufficient to show that the proceeding should abate. Consequently, it is urged that the trial court having decided the matter, its decision should not be controlled or interfered with by mandamus. The fact that the court exercised its judgment in determining that it had nothing before it is not decisive as to our power, because if the trial court erroneously refuses to proceed to trial of the issues of fact and render a decision, this court by mandamus can compel a trial to determine the issue, although in doing so it overrides the decision of the trial judge that he will not do so. The respondent's contention can be best answered in the language of the Circuit Court of Appeals for the Eighth Circuit in Barber Asphalt Pav. Co. v. Morris, 132 F. 945, as follows:

[1] The Circuit Court of Appeals for the Seventh Circuit has recently (September 19, 1941) reversed a conviction in a criminal case upon the identical ground raised by the petitioners, namely, that there was no proper order extending the power of the grand jury to sit in a later term than that in which they were impaneled. The question was raised in the lower court by a motion to quash the indictment and also by plea in abatement and apparently the government did not question the right of the Circuit Court of Appeals to review the ruling. (United States v. Johnson, 123 F. 2d, 113, 117.)

"Finally, it is insisted that the writ of mandamus should not issue in this case because that writ may not be used to compel a subordinate court to reverse or revise its decision of a question properly submitted for its consideration in the progress of a case before it, or to direct it how to decide or by what rules to proceed. * * * It is undoubtedly the general rule that a court has no power by writ of mandamus to compel a subordinate judicial officer to reverse a conclusion already reached, to correct an erroneous decision, or to direct him in what particularly way he shall proceed or shall decide a specified question. But it is equally a part of this general rule that the court always has the power by means of such a writ to compel such an officer to proceed to try and decide a controversy within his jurisdiction, or to perform any other plain duty imposed by law. * * * The power to compel such an officer to proceed to the trial and determination of a case which it is his duty to hear and decide necessarily includes within it the power to compel him to reverse and set aside any erroneous decision he may have made to the effect that he will not proceed to such a trial and judgment."

This decision is in line with decisions of the Supreme Court.

In a recent case, Ex parte United States, 287 U. S. 241, the Supreme Court issued a writ of mandamus to compel the trial court to issue a warrant upon an indictment notwithstanding the contention that the trial judge had exercised his discretion in refusing the warrant. In determining its jurisdiction to entertain the application the Supreme Court approved the rule in McClellan v. Carland, 217 U. S. 268, 280, laying down a general rule applicable alike to the Supreme Court and the Circuit Court of Appeals, namely: "That the power to issue the writ under R. S. 716 [28 U. S. C. A., Sec. 377] is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that 'where a case is within the appellate jurisdiction of a higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below,'" citing, among other cases, Barber Asphalt Pav. Co. v. Morris, 132 F. 945, supra.

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The respondent claims the decision of the Supreme Court in Ex parte United States, supra, is not authoritative because the action of the trial court there involved was ministerial and not judicial, and that the Supreme Court had jurisdiction to entertain a petition for mandamus under 28 U. S. C. A., Sec. 342; Judicial Code, Sec. 234. It is sufficient answer to respondent's contention to say that the court did not predicate its action upon Sec. 342, supra, but upon 28 U. S. C. A., Sec. 377, which applies alike to this court and the Supreme Court. Neither did it predicate its action

upon the theory that the action of the trial judge in issuing or refusing to issue a warrant was ministerial. The court referred to U. S. v. Thompson, 251 U. S. 407, which was a direct appeal from an order quashing a grand jury indictment, as pertinent to the refusal of a judge to issue a warrant upon some ground satisfactory to himself, but clearly erroneous.

We expressly refrain from deciding whether or not the question raised by the petitioners is one of jurisdiction (see Ex parte Bain, 121 U. S. 1, 13), because it is unnecessary to pass upon that question in order to reach a conclusion herein.

It follows that we have jurisdiction to issue a writ of mandamus if we are of opinion that the District Court erred in striking out the petitioners' pleas. The pleas allege in terms that the investigation by the grand jury of the offenses charged against petitioners was not begun during the term in which they were impaneled. It is also alleged that no investigation of these matters had been begun before February 26th, and that therefore the order of the District Court which authorized the grand jury
310 to continue a consideration of the investigations already begun, referred in terms to the date when the order was petitioned for, that is, February 26th. It is conceded that if these facts are true the grand jury had no power to consider the matter or to return the indictment.[2] It is claimed by the respondent, however, that in order to present a proper plea the petitioners could not reply upon the general allegation that no investigation had begun prior to the expiration of the term in which the jury was impaneled, because the proceedings of the grand jury are secret and it must be assumed that unless otherwise alleged the defendant had no information on which to base the general allegation. Assuming without deciding that this is true, a careful consideration of the allegations in the pleas indicates that the petitioners had good ground for their allegations. We do not intend to set up these allegations in detail, but they are based upon the statements of the United States attorney that the "investigation" did not begin until the 28th day of February, two days before the end of the term in which the jury was impaneled and upon the minutes of the grand jury for the 27th and 28th of February which were disclosed by the United States in response to the demand of the petitioners.[3]

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[1] "* * * A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by any such grand jury. * * *." 28 U. S. C. A. § 421.

[2] In U. S. v. Johnson, 123 F. 2d. 111, 120, the court said: "We are not unmindful of the rule invoked by the Government that pleas in abatement and those of a kindred nature must be strictly construed. Facts must be stated, not conclusions. Here, however, the allegations are direct and positive. It is difficult to see how they could have been more specific. The challenge went to the very heart of the authority of

We conclude that the petitioners allege sufficient evidentiary facts to justify their general allegation that the investigations of their alleged crimes were not begun before the end of the term in which the jury was impaneled, and that the government's denial raised a factual issue which should be tried. Having decided that we have jurisdiction to consider the matter presented
311 by the petitioners, and that the action of the trial court was erroneous, the next question is whether or not there are such unusual facts and circumstances as to justify the intervention of this court by mandamus.

In this connection it should be stated that in the return of the order to show cause the respondent has not only admitted, but has expressly alleged most of the evidentiary and circumstantial matters relied upon by the petitioners to justify the allegation that no investigation of the offenses charged was begun before March 2, 1942. While we do not pass upon the sufficiency of this evidence to prove petitioners' pleas, which is a question exclusively for the trial court, it is clear that the issues thus raised should be determined in that court. It seems to be conceded that this trial should be before a jury (citing 28 U. S. C. A., § 770; R. S. §§ 566, 648) but upon that question we express no opinion, leaving it for the determination of the trial court in the first instance.

It is unquestioned that the trial of the issues raised by the plea of not guilty would be long and costly. The respondent does not deny the contention of the petitioners that a trial on the merits of the indictment would cost them hundreds of thousands of dollars and require months of time, whereas it is clear that the trial of the issue as to whether or not proceedings were instituted before the 2nd of March, that is, on February 28th, can be readily and quickly determined. Clearly, the defendants are entitled to have this issue disposed of before being subjected to a trial on the indictment.

In view of our decision it may be unnecessary to issue the writ of mandamus to the lower court. We will suspend the issuance of the writ for 30 days, in order that the lower court may proceed as indicated. Writ of mandamus will not follow the terms of the petition, but will merely require the court to reinstate the petitioners' pleas and the government's reply thereto and proceed to the trial of the factual issues thus raised.

Judge Stephens does not participate in the decision of the foregoing case.

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the grand jury to act. The Government's motion to strike should have been overruled and the Government required to answer. The defendants were entitled to an opportunity to offer evidence in support of the motion and plea." Citing, Carter v. Texas, 177 U. S. 442, 447.

312 *Dissenting opinion*

HAMAN, Circuit Judge, dissenting:

This is a proceeding in mandamus in which the petitioners seek to have vacated an order of the district court, granting, because of failure to allege a defense, a motion to strike petitioners' pleas in abatement which sought to quash the indictment. The order was rendered after a hearing with argument and deliberation. There was no motion below to amend the pleas and the abatement proceeding was completely terminated.

I. There was no error in striking the pleas in abatement

This dissent is, in part, to the holding of the majority opinion that the pleas "allege in terms that the investigation by the grand jury of the offenses charged against petitioners were not begun during the term in which they were impanelled." These "terms" constitute the essence of the matter submitted for Judge Roche's dicision. In a case of such importance that it required our first plenary session, both the litigants and the judge reversed seem entitled to a statement of the allegations ruled upon by that judge, and a reasoned consideration of the character of the error he has committed.

The plea in abatement is an affirmative defense in a proceeding separate from the trial on the indictment. The pleas here must allege that during the entire 1940 November term the grand jury commenced no investigation of the matters alleged in the indictment.

It is a very simple matter to draw such an allegation of ultimate fact. Forty-three of the defendants, all except the Carnation Company,[1] chose to do otherwise. They pleaded the facts on which they relied as establishing their contention and limited their allegation of an absence of action in the 1940 November term to these facts. Since the proceeding was in abatement the court was obliged to construe strictly the allegations so limited. Olmstead v. United States, 19 Fed. (2d) 842, 845 (C. C. A. 9).

As to these forty-three defendants what Judge Roche actually passed upon were allegations concerning the minutes of the grand jury dated February 28, 1941, alleged to be as follows:

313 "Special meeting of the Federal Grand Jury held this day, Foreman Mrs. Hattie H. Sloss, presiding. Minutes of previous meeting read and approved as corrected. (See below.)

[1] The Carnation Company pleaded the entire record in the case, including the minutes of the grand jury, infra, and sought a decision analogous to a motion for an instructed verdict. The plea alleged no defense.

Special Assistant to the Attorney General Charles C. Pearce and Special Assistant Charles S. Burdell continued the presentation of the investigation of the peach industry for violation of the Sherman Anti-Trust Act. There being no further business the meeting adjourned." Signed "C. N. Alexander, Secretary, Approved Eva L. Gibson, Foreman, pro tem."

"The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun. Other industries named as subject to investigation are Salmon Industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland; Asparagus and Cherries. Following this is the plea's allegation that

"The 'previous meeting' referred to in said minutes was the meeting of February 27, 1941. The statement in said minutes, 'investigation begun,' with reference to the canned and evaporated milk industry is a conclusion of law, not supported by the facts stated in said minutes. Said minutes show, *and on the basis thereof said defendants allege*, that no investigation of any matter mentioned in said indictment and no investigation of any defendant joining in this plea was 'begun,' within the meaning of the Act of April 17, 1940 (U. S. C. 28:421), on February 27, 1941, or at any other time during the said November 1940 term." [Italics inserted.]

If the matter following the grand jury secretary's signature is not deemed part of the minutes and the matter above is deemed to stand alone there is no allegation at all that at no prior session was begun an investigation of the evaporated milk industry. Hence, no defense is stated.

If the statement below that "the following industries were also named by witnesses and investigations begun * * * canned
314 and evaporated milk," is part of the minutes then there is no allegation that what was described as an "investigation begun" was not of such matters as are described in the indictment. Hence, the fact of the nonexistence of the beginning of the investigation is not affirmatively alleged and the plea states no defense.[2]

If it be true that the words "investigation begun" state a conclusion of law (and not as I believe an ultimate fact) then the succeeding allegation (of which the "basis" is what "said minutes show") is a mere conclusion of law. That allegation is, "* * *

[2] It is my understanding that Judge Healy concurs in the conclusion that there was no error in Judge Roche's order striking out the pleas.

that no investigation of any matter mentioned in said indictment and no investigation of any defendant joining in this plea was 'begun', * * *."

The words of the minutes "investigation begun" of the "canned and evaporated milk industry" mean just what they say and describe a fact and not a conclusion of law. These words cannot be tortured into the necessary allegation that no act was done by the grand jury in the November 1940 term by way of beginning an investigation of the acts of defendants with reference to their possible indictment for violating the Anti-Trust Law in connection with the evaporated milk industry. Judge Roche committed no error in striking the pleas. That the petitioners had fully stated their defense in the pleas is apparent from their not seeking to amend.

However, the court has no power to issue mandamus even assuming the lower court erred in its final decision on the issue of law tendered by the pleas and joined by the motions to strike.

II. *Every plea in abatement tenders two issues, one of law as to its sufficiency, and one of fact. The decision adverse to the plea of the tendered issue of law joined by a motion to strike for sufficient facts, makes a complete and terminating disposition of the separate abatement proceeding*

This dissent is also from the holding of the majority that "The trial court, by striking out the pleas in abatement, makes it impossible for the decision of the trial court on the issues raised by the pleas to reach this court," and "The effect of the decision
315 of the trial judge striking out the pleas is to prevent the entry of an appealable judgment."

In this respect the majority opinion is in square conflict with the recent decision of the Seventh Circuit in United States v. Johnson, 123 Fed. (2d) 111. There, as here, the question was whether the grand jury had begun its investigation in the term for which it was created. On a motion to quash, the defendants, as here, attempted to allege the facts supporting the motion. There, as here, the government raised the issue of law as to the sufficency of the facts alleged, by a motion to strike. The court says of this motion to strike,

"The government had an opportunity to answer the allegations of the motion to quash, but instead, entered a motion to strike, which was allowed. By such motion a legal question was presented which must be determined from the averments of the motion to quash." Id. 118.

The circuit court of appeals entertained the claim of error in the lower court's ruling on appeal from the judgment on the verdict and reversed.

The plea in abatement tenders two kinds of issues. One is an issue of law as to its sufficiency, this to be joined, as here, by motion to strike or by demurrer. The other is an issue or issues of fact to be joined by the replication.

It is elemental that if, as here, the tendered issue of law, so joined, is decided adversely to the plea, the abatement proceeding (in the absence of amendment, not here sought) is ended. The judicial duty of the trial court and its only judicial duty is to dismiss or strike out the plea. In so doing the district judge does not refuse to permit a replication to be filed, which, if it join the tendered issue of fact, it refuses to allow to go to trial. What the judge does is to make a judicial determination that there is nothing to answer and nothing to try. The separate proceeding in abatement is so decided and terminated.

The adjudication refusing to sustain the plea in abatement is a denial of its prayer to quash the indictment. The illogic of the majority position that this is not judicial action determining
316 that there is nothing to go to a jury, but a refusal of the court to take any judicial action whatsoever and hence warranting mandamus is apparent when we apply this reasoning to a direct motion to quash the indictment because it alleges no facts constituting a crime.

Under the reasoning of the majority holding, the trial court's denial of a direct motion to quash the indictment (and hence discharge the accused) is not a judicial determination that the accused must be tried. It is a refusal to act at all with regard to the quashing of the indictment. Hence, mandate should issue at once to determine whether the court committed error in so construing the indictment!

Under this reasoning in every mail fraud or other conspiracy case and indeed any case involving an expensive, time consuming trial, there must be entertained such a mandamus proceeding if a motion to quash the indictment be denied, just as now must be entertained a mandamus proceeding in every such case where such pleas in abatement are stricken on motion!

Judge Roche here proceeded to try the issues of law so joined by the government's motions to strike[3] on the grounds that the only relief prayed for is not warranted by the facts alleged. The transcript shows,

"The motions to strike * * * certain pleas in abatement *having been argued and submitted to the Court for consideration and*

[3] It is not seriously questioned that in criminal pleading, the issue of absence of facts may be raised by a motion to strike. United States v. Johnson (C. C. A. 7) 123 Fed. (2d) 111, 118. In any event the court has inherent power, in its discretion and without motion, to hold a hearing and strike out such pleas. In the enforcement of the criminal law the court is under judicial obligation to reach the trial on the merits of the charges of the indictment with all the dispatch compatible with the proper preparation of the facts on the merits by the prosecution and defense. Causing on its motion, the disposition of a plea, which the court judicially holds as mere deadwood, is a proper performance of the trial court's obligation in this respect.

decision and the Court being fully advised, it is ordered that the motions to strike the First, Second, Third, and Fourth such pleas, and each of them, contained in the pleading entitled 'Pleas on Behalf of Certain Defendants' filed on September 13, 1941,
317 by Messrs. Pillsbury, Madison & Sutro and associated counsel, be and the same is hereby granted; that said Motions to strike the Fourth Plea and Fifth Plea, and each of them, contained in the pleading 'Plea on Behalf of Carnation Company' filed herein on August 29, 1941, by Arthur B. Dunne, Esquire, be and the same are hereby granted; * * * [Italics added.]

Judge Roche thus completely disposed of the separate proceeding after judicial consideration of the tendered issue of law joined by the motion to strike.

It is obvious that Judge Roche's full performance of his function in deciding the issue of law so raised does not become no performance at all because he may have erred. He causes no cessation of the criminal proceeding which it appears from the petition is set for trial. In this respect his action is entirely different from the refusal to act by the district judges in McClellan v. Carland, 217 U. S. 268, 280; Ex parte United States, 287 U. S. 241, 246; and Barber Asphalt Pav. Co. v. Morris (C. C. A. 8), 132 Fed. 945, where mandamus was held applicable.

In McClellan v. Carland, the district judge refused to proceed with the case before him until the decision of the same cause of action pending in the state court. It is obvious that upon a decision of the state court on the merits the case would be res judicata and the appellate court frustrated of an appeal considering the merits. The Supreme Court held

"Inasmuch as the order of the Circuit Court staying the proceeding until after final judgment in the state court might prevent the adjudication of the questions involved, and thereby prevent a review thereof in the Circuit Court of Appeals, which had jurisdiction for that purpose, we think that court had power to issue the writ of mandamus to require the Circuit Court to proceed with and determine the action pending before it."

The phrase "unauthorized action" in the portion of that opinion cited by the majority opinion here that "where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the
318 court below," means what it says—action unauthorized, not as here, the authorized action of deciding the issue of law, in which authorized action error may be committed.

The decision in Barber Asphalt Paving Co. v. Morris, supra, relied on in the majority opinion, is also a case in which the district judge refused to proceed while awaiting a decision of the

same cause in the state court. The language cited in the majority opinion,

"* * * But it is equally a part of this general rule that the court always has the power by means of such a writ to compel such an officer to proceed to try and decide a controversy within his jurisdiction, or to perform any other plain duty imposed by law. * * * The power to compel such an officer to proceed to the trial and determination of a case which it is his duty to hear and decide necessarily includes within it the power to compel him to reverse and set aside any erroneous decision he may have made to the effect that he will not proceed to such a trial and judgment." has no applicability here where the Judge did "proceed to the trial and determination" of the issue of law tendered in the separate abatement proceeding, and adjudicated it adversely to petitioners.

In Ex parte United States, the district judge refused to issue a bench warrant sought by the district attorney, and thereby obtain jurisdiction in personam over the indicted defendant.[1] There is no conceivable way in which the United States can appeal from such refusal of the court to act. Unless the accused voluntarily appear, there may never be a trial from which on conviction there would exist appellate jurisdiction. The sole question presented and decided was stated as follows:

"The sole ground alleged in the return for such denial is that the matter was within the judicial discretion of the court, and, therefore, not subject to mandamus proceedings."

The Court held that no discretion existed to issue the bench warrant as it was mandatory, and that "The refusal of the
319 trial court to issue a warrant of arrest under such circumstances is, in reality and effect, a refusal to permit the case to come to a hearing upon either questions of law or of fact, and falls little short of a refusal to permit the enforcement of the law."

The issue of mandamus in such a case where the judge's action was mandatory and where there was no right of appeal has no relevance to the case at bar where the district judge exercised fully his function of deciding the issue of law and where, as later discussed, there is an appeal to cure his alleged error in so exercising that function.

III. The *majority decision necessarily holds that both the United States and petitioners may present on appeal, claimed error in the final disposition of this abatement proceeding*

The majority opinion states that it declines to pass on the question whether the pleas in abatement are to the jurisdiction of

[1] Jurisdiction in personam is essential to the jurisdiction of the court. Employers Corp. v. Bryant, 299 U. S. 374, 381.

the court and hence whether the petitioners have a right to present on appeal a claim of error in an adverse decision thereon.[5] It is obvious that in so refusing to pass on the question whether the decision of the district court is or is not reviewable on appeal from an adverse verdict, it necessarily follows that the majority assume that even if error in the decision may be corrected on appeal, nevertheless mandamus will be granted for its immediate correction.

However, the majority opinion holds that the pleas are of the following character:

"The petitioners, having been indicted by a grand jury for a violation of the Sherman Antitrust Law, pleaded in abatement that the grand jury returning the indictment was drawn in the term previous to that in which they returned the indictment, and that the hearing before the grand jury upon which the indictment was based was not begun until after the expiration of the term in which the jury was impaneled."

Assuming the majority opinion properly describes the pleas, it means that they allege that no indictment was presented by any grand jury. The district court had before it a document purporting to be an indictment, but which in legal contemplation was nothing. Hence, it is a necessary conclusion that the court had jurisdiction neither of the subject matter nor of the persons of the defendants. The decisions in Ex parte Bain, 121 U. S. 1, and Albrecht v. U. S. 273 U. S. 1, 8, clearly apply.

In Ex parte Bain, the petitioner sued out a writ of habeas corpus, alleging that he had been tried on an indictment amended
320 on motion of the government after its return by the grand jury. The Supreme Court held that since the indictment was "no indictment of a grand jury" the court had no jurisdiction to try or convict the petitioner, saying,

"It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment."

Directly in accord is the decision of the Supreme Court in Albrecht v. United States, supra, where the court, citing Ex parte Bain, held that

"A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court,"

[5] 28 U. S. C. A. § 879 gives petitioners the right to present on appeal their claim of error in an adverse decision, if the plea is to the court's jurisdiction.

and that a court "may acquire jurisdiction over the person of the defendant" only "when there was an appropriate accusation either by indictment or information, * * *."

There is, of course, no ground of distinction between an "indictment" which is no indictment at all because it has been amended, as in Ex parte Bain, supra, and an "indictment" which is no indictment at all because it was returned by the grand jury without power to return it. Having no power, the members of the jury do not act as a grand jury and the effect of their action is nothing more than if a group of bystanders had handed to the court a paper labeled "indictment".

Since the pleas are to the jurisdiction it follows that the petitioners here have the right under 28 U. S. C. A. § 879 to claim error on appeal. United States v. Johnson, supra. The only question here presented is whether their claim of error on the appeal allowed by law may be shortened in time by a writ of mandamus.

Since the court holds that the government has recently been given the right of appeal, this court has jurisdiction on an appeal by either party aggrieved by the final decision in the separate proceeding in abatement. If the plea is sustained and the
321 indictment quashed the government may appeal at once. If, as here, the plea be denied either because of its failure to state a cause for quashing the indictment or on a trial of the facts, the petitioners, if they later are convicted, may then appeal both on the denial of the pleas and the convictions.

IV. Mandamus will not be granted where the party aggrieved by a decision of the trial court has a remedy by appeal whether immediate or on a final decision of the case

Since the petitioners may appeal from the judgment on conviction and present the claimed error in striking out the pleas, it is apparent that the majority opinion granting mandamus is not doing what it claims, i. e., that it is issuing its writ "in aid of its appellate jurisdiction." On the contrary it is defeating its appellate jurisdiction to review the claimed error, and is substituting its writ of mandamus for the appeal. The decision on mandamus is res judicata of the claimed error and prevents its reconsideration on appeal.

That this court is prohibited from so defeating its appellate jurisdiction has been repeatedly decided by the Supreme Court in a series of cases from Ex parte Harding, 219 U. S. 363, 371, to In re Labor Board (1938) 304 U. S. 486, 496, each holding that it is not agreeable to the usages and principles of law so to prevent appeal and substitute mandamus therefor. The principle is ap-

plied whether the adjudication below warrants an immediate appeal or is merely interlocutory in character, where error may be asserted only when appeal is taken from the final judgment.

In Ex parte Harding, federal jurisdictjon was claimed on the ground of diversity of citizenship and a separable controversy. A motion to remand was made on the ground that these jurisdictional facts were not present. The district court took evidence and denied the motion. Mandamus to compel him to remand was sought in the Supreme Court. That Court reviewed many of its preceding decisions, distinguishing some, overruling others, and at page 371, reaffirmed its ruling in the preceding identical case of In re Pollitz, 206 U. S. 323, 331. The Court states the rule so reaffirmed,

"The court [in the Pollitz case], after stating (p. 331) the general rule that 'mandamus cannot be issued to compel the court below to decide a matter before it in a particular way
322 or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error,' refused to take jurisdiction and review the action of the court below, and therefore declined to issue the writ."

This holding was reaffirmed where the presentation of the claimed error in the ruling on the jurisdictional amount under the Federal Employers Liability Act also had to wait the appeal on the judgment on the merits. Ex parte Roe, 234 U. S. 70, 73.

The Harding and Roe decisions were made the ground of the decision in Ex parte Park Square Automobile Station, 244 U. S. 412, where a motion to remand from the Northern District of New York to the United States District Court of New Hampshire was denied. The Supreme Court states,

"This motion having been overruled (222 Fed. Rep. 979), the case was brought directly here upon the theory that the alleged error resulting from the refusal to remand was susceptible of being reviewed although no final judgment had been entered in the cause."

It was argued that the writ of mandamus should issue because of the saving of expense,

"* * * because of the grave wrong which would result from forcing the petitioner to try its case in the State of New York at great inconvenience and expense as a preliminary to securing a review of the question of jurisdiction, an expense and inconvenience which would be saved if by review now by means of a writ of mandamus the removal statutes be given their natural meaning and thus the wrong and confusion arising from their misconstruction would be avoided. And, in support of the exceptions

thus asserted, reliance is placed on expressions contained in the opinion in Ex parte Harding, 219 U. S. 363, 373, by which it is contended they are sustained.

"But conceding that the error which the proposition attributes to the ruling below is manifest, the conclusion drawn from the opinion in Ex parte Harding is obviously a mistaken one."

323 In denying that such saving of expense justifies the writ the Court holds,

"And this also makes clear that however grave may be the inconvenience arising in this particular case from the construction which the court gave to the statute and upon which it based its assertion of jurisdiction, greater inconvenience in many other cases would necessarily come from now departing from the established rule and reviewing the action of the court by resort to a writ of mandamus instead of leaving the correction of the error to the orderly methods of review established by law."

In Ex parte Chicago R. I. & P. Ry., 225 U. S. 271, 280, the rule in the Roe case was applied though the right to appeal had been lost by failure to follow the appropriate procedure.

These cases were cited with approval, but necessarily held not controlling because there was no remedy by appeal, in Maryland v. Soper, 270 U. S. 29. There the grand jury of the State of Maryland had had indicted several defendants for murder. The case was removed from the state court to the Maryland United States District Court. Maryland could not appeal either from the denial of the motion to remand or the judgment of acquittal in the United States District Court and thus have presented the question of the power of the United States to deprive the Maryland court of the right to try the crime committed in that state. Hence, the admitted rule of the Harding and Roe cases did not apply and the writ of mandamus issued.

Similarly it was necessary to distinguish the Harding and Park Square Automobile Station cases in Stratton v. St. Louis S. W. Ry., 282 U. S. 10, 16, where no appeal lay from a decision of a single judge in a three judge case under Section 266 of the Judicial Code, 28 USCA § 380. Mandamus which, it is held, would be denied if remedy by appeal existed, was granted.

Similarly in In re Labor Board (1938) 304 U. S. 486, 496, the Harding and Ex parte Chicago R. I. & P. Ry. cases were cited and the writ issued because the remedy by appeal was not available to the Labor Board where the circuit court of appeals, without jurisdiction, in a proceeding commenced against the Board by the Republic Steel Corporation because no transcript

324 of the Board's proceedings had been filed, enjoined the Board from further proceedings in the case before it. The

sole questions discussed and decided were the absence of jurisdiction and the absence of any method of review of the court's restraining order which would bring the case before the Supreme Court. It is apparent that if, as in the case at bar, the claimed error of the court's restraining order could have been determined by appeal the writ of mandamus would have been denied.

Probably no better statement of the rule has been made than in the recent holding in Mr. Justice Cardozo's opinion in I. C. C. v. United States (1933) 289 U. S. 385, 393.

"Errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact. If the Commission had declined to listen to the claim for reparation, or finding reparation due had declined to order payment, mandamus might have been available to hold it to its duty. That is not what happened. The Commission heard the complaint and proceeded to a decision. If the mandamus were to stand, the result would not be compel the Commission to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action."

V. Avoidance of the expense of a trial is no ground for granting the writ, where an appeal is available

This dissent is also to the holding that "Clearly, the defendants are entitled to have this issue disposed of before being subjected to a trial on the indictment", because of time and expense of that trail.

The latest Supreme Court case in which the contention is made that on an interlocutory decision the losing litigant may have a writ of mandate to avoid the expense of the trial of the main issue is Ex parte Park Square Automobile Station, supra. There the court rejected it in the language above quoted. This court also in Whittel v. Roche (1937) 88 Fed. (2d) 366, 371, rejected it, saying,

325 "The question before us is whether the power to issue the writ exists and that to say the least depends upon the existence of special circumstances *other than the mere expense of trial.*" [Italics supplied.]

I see nothing in the present case to warrant an overruling of the principle so established. Here are 44 defendants alleged to control one of the largest and most widely distributed manufacturing and selling industries in the United States. The time

of trial will be long but so also is it in many mail fraud and other conspiracy cases. The costs will be large compared to other cases, but not compared to their huge capital investments whose use is alleged to have been perverted to acts creating monopolistic prices.

If the present law were changed and it were a matter of discretion to determine at what point the costs were sufficient to substitute mandamus for appeal, great disorder would ensue. What would be the criterion?

Certainly the human element is of primary concern in criminal justice. Will the measure be whether the cost will be ruinous to an accused man? Suppose it is an elderly bookkeeper charged with embezzlement, facing what is to him a long heartbreaking trial of two weeks. The time is short compared to a conspiracy trial, but is it short in human value? Suppose the bookkeeper mortgages his homestead for $3,000 to meet his costs and he and his family emerge from an acquittal into aged poverty. Should he be refused the mandamus to review his denied claim that the indictment should be quashed because he could be tried in a fortnight and the costs be only $3,000, while the writ is granted to these great corporations?

VI. This court has no power to direct the form of the allegations of the government's replications

This is also a dissent from assumption of the power by this court to direct the manner in which a litigant, here the government, shall make its replication to the plea. Assuming the existence of jurisdiction to issue mandamus to set aside the order of the lower court on the motion to strike, it seems the court's powers end with the mandamus to set aside the order.

326 The government's replications to the pleas were withdrawn,* and on the motion to strike the pleas serious consideration was given to their phraseology. Having this court's construction before it, the government well may desire to file replications different from those it withdrew. Yet the court orders the restoration of the withdrawn replications and that the court below shall proceed to try the issues of fact so framed by this court and not by the litigant.

It is elementary that the appellate court cannot control the discretionary acts either of the district court or the parties to the litigation.

The petition for the writ should be denied.

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* The order of the district court granting, before trial, the motion to withdraw the replications is clearly within the discretion of the trial judge. Loeb v. Eastman Kodak Co., 183 Fed. 704, 710 (C. C. A. 3).

327 *Dissenting opinion*

HEALY, Circuit Judge, Dissenting:

I believe mandate should be denied. The trial judge ruled on the sufficiency of the pleas in abatement. Not only did he rule; I think he ruled correctly.

The grand jury minutes, as set out in the pleas, affirmatively state that the investigation of the canned and evaporated milk industry was begun February 27, 1941, that is to say, during the term in which the jury were impaneled. The general allegation to the contrary, contained in the pleas, is substantially negatived by all evidentiary matters pleaded in support thereof, namely, the minutes and the statements of the United States attorney who was in charge of the investigation. Pleas of this kind are strictly construed; and that were compelling reasons for scanning the pleas narrowly in this instance. Without at all questioning the motive of the petitioners, it is to be noted that their pleas in abatement contemplate nothing more nor less than a fishing expedition into the proceedings had before the grand jury relative to their case. Thus the accused, in advance of trial, may on purely speculative grounds obtain access to wholly privileged material. The trial judge committed no error in striking the pleas for insufficiency.

But assuming the judge was in error in his ruling, I think the error may be reviewed by this court only upon appeal from the final judgment in the event the case goes against the indicted parties. Mandate issued at this juncture is not in aid of our appellate jurisdiction; it is an unwarranted exercise of supervisory control over the conduct of the case below. What the majority do is to reverse the trial judge for an error of law committed in the discharge of a judicial function, and to dictate to him how he shall discharge that function. Such is not the office of mandate, I. C. C. v. United States, 289 U. S. 385, 393. The chief argument in support of the course is said to be the saving of the expense of a long trial. At best the argument is of doubtful validity. It can be advanced with equal force in cognate situations in many cases, civil as well as criminal. If it be accepted as justifying so extraordinary an assumption of power the consequence can only be endless delays and the disruption of the orderly administration of justice in the trial and appellate courts. Perhaps prece-
328 dents may be found in the books for such a course, but we are by no means obliged to follow them.

[Endorsed:] Opinion and Dissenting Opinions. Filed Sept. 12, 1942, Paul P. O'Brien, Clerk.

329 In United States Circuit Court of Appeals, Ninth Circuit

No. 10034

EVAPORATED MILK ASSOCIATION, ET AL., PETITIONERS

vs.

HONORABLE MICHAEL J. ROCHE, Judge of the District Court of the United States for the Northern District of California, Southern Division, and THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, RESPONDENTS

Order amending order of Sept. 12, 1942.

[Oct. 7, 1942]

It is ordered that the order of this court entered on the 12th day of September, 1942, in the above-entitled cause be, and hereby is amended to read as follows:

By direction of the Court, it is ordered that the typewritten opinion and dissenting opinions this day rendered by this court in the above cause be forthwith filed by the clerk, and that the writ of mandamus issue in accordance with the majority opinion.

It is further ordered that the issuance of said writ of mandamus be, and hereby is stayed for a period of 30 days from date hereof, that the lower court may proceed as indicated in the majority opinion rendered.

DENMAN, C. J., not approving order.

STEPHENS, C. J., not participating in decision.

(Signed) ARTHUR B. DUNNE,
FRANCIS R. KIRKHAM,
WALTER F. OLDS,
Attorneys for Petitioners.

(Signed) THURMAN ARNOLD,
Asst. Atty. Gen.,
FRANK J. HENNESSY,
U. S. Atty.,
PIERCE W. BRADLEY,
Spec. Asst. to the Atty. Gen.
Attorneys for Respondents.

330 In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted.]

Petition for stay and order thereon

Filed Oct. 12, 1942

Come now the respondents in the above-entitled cause and represent to this Honorable Court as follows:

Whereas on September 12, 1942, an order was made by this court directing that the majority opinion and the two dissenting opinions rendered on that day be forthwith filed by the clerk and ordering that the issuance of the writ of mandamus be stayed for a period of thirty days from September 12 in order that the lower court would have an opportunity to proceed as indicated in the majority opinion; and

Whereas the respondents are desirous of petitioning the Supreme Court of the United States at Washington, D. C. for
331 the writ of certiorari to issue so that the respondents may obtain a review of the decision of this court in this case,

Now, therefore, respondents pray this Honorable Court as follows:

1. That conditioned upon the undertaking of the respondents promptly to file a petition for certiorari in the Supreme Court of the United States, this court enter an order directing that upon the issuance of the writ of mandamus in this case, the said writ and the service thereof be stayed for a period of thirty (30) days, or until November 13, 1942.

2. That this court further order that in the event the petition for the writ of certiorari is granted by the Supreme Court, the writ of mandamus be stayed by this court until such time as the entire proceeding has been determined in the Supreme Court and the mandate of that court filed in the office of the clerk of this court.

Respectfully submitted.

(s) PIERCE W. BRADLEY,
Special Assistant to the Attorney General.
(s) THURMAN ARNOLD,
Assistant Attorney General.
(s) FRANK J. HENNESSY,
United States Attorney.

Dated at San Francisco, Calif., this 12th day of October 1942.

So ordered:

(s) FRANCIS A. GARRECHT,
Circuit Judge.

332 In United States Circuit Court of Appeals for the Ninth Circuit

Petition for stay and order thereon

Filed Oct. 29, 1942

Come now the respondents in the above-entitled cause and represent to this Honorable Court as follows:

Whereas on September 12, 1942, an order was made by this court directing that the majority opinion and the two dissenting opinions rendered on that day be forthwith filed by the clerk and ordering that the issuance of the writ of mandamus be stayed for a period of thirty days from September 12 in order that the lower court would have an opportunity to proceed as indicated in the majority opinion; and

Whereas on October 12, 1942, there was filed in the office of the clerk of this court an order, effective October 7, 1942, amending the aforesaid order of September 12, 1942, which amended order specifically directed that the writ of mandamus issue and thereafter stayed the issuance of said writ for

333 a period of thirty days; and

Whereas the respondents are desirous of petitioning the Supreme Court of the United States at Washington, D. C., for the writ of certiorari to issue so that the respondents may obtain a review of the decision of this court in this case.

Now, therefore, respondents pray this Honorable Court as follows:

1. That this Court enter an order directing that the issuance of the writ of mandamus in this case and the service thereof be stayed pending the filing of a petition for certiorari in the Supreme Court of the United States, pending the action taken by the Supreme Court on said petition for the writ of certiorari and in the event the petition for the writ is granted, pending the determination of the entire proceeding in the Supreme Court.

Respectfully submitted.

(s) PIERCE W. BRADLEY,
Special Assistant to the Attorney General.

Dated at San Francisco, California, this 29th day of October 1942.

(s) THURMAN ARNOLD,
Assistant Attorney General.
(s) FRANK J. HENNESSY,
United States Attorney.

So ordered:

(s) FRANCIS A. GARRECHT,
Circuit Judge.

[Filed endorsement omitted.]

334 [Clerk's certificate to foregoing transcript omitted in printing.]

335 In Supreme Court of the United States

Stipulation as to printing record

Filed Dec. 11, 1942

It is hereby stipulated between the petitioners, by their attorneys, and the respondents, by their attorneys, that in printing the record in the above-entitled cause for the use of this court the clerk shall omit from the certified copy of the record thereof the following matter which is not essential to a consideration of the questions presented by the petition for the writ of certiorari.

1. Omit that portion on the petition for rehearing which constitutes the legal brief thereon which appears at pp. 280-302 of the certified copy of the record.

It is further stipulated that the matter above mentioned to be omitted from the printed record shall be preserved by the court and may be referred to by counsel or the court, if deemed necessary, during the course of the argument or otherwise during the disposition of the cause.

Dated this 9th day of December 1942.

336 Charles Fahy—Charles Fahy, Solicitor General of the United States of America, for the petitioners; Pillsbury, Madison & Sutro—Pillsbury, Madison & Sutro; Marshall P. Madison—Marshall P. Madison; Francis R. Kirkham—Francis R. Kirkham; Morrison, Hohfeld, Foerster, Shuman & Clark—Morrison, Hohfeld, Foerster, Shuman & Clark; Herbert W. Clark—Herbert W. Clark; Dunne & Dunne—Dunne & Dunne; Arthur B. Dunne—Arthur B. Dunne; Webb, Webb & Olds—Webb, Webb & Olds; U. S. Webb—U. S. Webb; Walter K. Olds—Walter K. Olds; Brobeck, Phleger & Harrison—Brobeck, Phleger & Harrison; Maurice E. Harrison—Maurice E. Harrison; Willis I. Morrison—Willis I. Morrison; Lee M. Olds—Lee M. Olds; Joseph A. Murphy—Joseph A. Murphy; Nat Brown—Nat Brown; J. Wesley Cupp—J. Wesley Cupp; E. R. Hoerchner—E. R. Hoerchner; W. E. Foley—W. E. Foley; James E. Foley—James E. Foley; Patrick A. Geraghty—Patrick A. Geraghty, Attorneys for the respondents.

[File endorsement omitted.]

U. S. GOVERNMENT PRINTING OFFICE, 1942

Supreme Court of the United States

No. 584, October Term, 1942

Order allowing certiorari

Filed February 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

DEC 12 1942
CHARLES ELMORE CROPLEY
CLERK

No. 584

In the Supreme Court of the United States

OCTOBER TERM, 1942

HONORABLE MICHAEL J. ROCHE, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, PETITIONERS

v.

EVAPORATED MILK ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 584

HONORABLE MICHAEL J. ROCHE, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, PETITIONERS

v.

EVAPORATED MILK ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General on behalf of petitioners prays that a writ of certiorari be issued to review a judgment of the Circuit Court of Appeals for the Ninth Circuit granting a writ of mandamus to require the United States District Court for the Northern District of California, Southern Division, and the judge of that court to reinstate certain pleas in abatement to the indictment in the case of *United States* v. *Evaporated Milk Association, et al.*, which pleas the district court had stricken as insufficient in law.

OPINION BELOW

The opinions of the Circuit Court of Appeals (R. 130–147) are reported in 130 F. (2d) 843.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 12, 1942 (R. 148, 129). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below was authorized to issue a writ of mandamus to the district court to correct its alleged error in ruling upon the sufficiency of respondents' pleas in abatement.[1]

STATUTE INVOLVED

Section 262 of the Judicial Code, 28 U. S. C., Sec. 377, provides in part:

> The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

---

[1] If certiorari is granted, the Government reserves the right to argue that, even if this case is one in which writ of mandamus might properly issue, the district court did not err in its holding that respondents' pleas in abatement were insufficient. On this point see the opinions of the dissenting judges (R. 135–147).

STATEMENT

An indictment returned in June 1941 in the United States District Court for the Northern District of California, Southern Division, in a case entitled *United States* v. *Evaporated Milk Association, et al.*, charged respondents and certain other defendants with conspiring to fix the prices of evaporated milk sold in certain States and territories, in violation of Sections 1 and 3 of the Sherman Act (R. 12–21). The indictment stated that the grand jury which returned the indictment had been impaneled at the November 1940 Term of court and that, by order of the court, it had continued to sit during the March 1941 Term for the sole purpose of finishing investigations begun but not completed during the November Term (R. 12–13).

In September 1941 respondents filed pleas in abatement which alleged certain facts designed to show that investigation of the subject matter of the indictment had not been begun by the grand jury during the November 1940 Term of court (R. 34–48).[2] The Government filed replications which were in the nature of general denials but

---

[2] The pleas were based upon Section 284 of the Judicial Code, 28 U. S. C., Sec. 421, which provides in part:

"* * * A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, * * *."

later, with leave of court, withdrew its replications and filed motions to strike the pleas in abatement (R. 52–55). The grounds for these motions were that the pleas in abatement did not state specific facts with sufficient certainty, that the facts alleged could not be within the pleaders' own knowledge, and that the pleas were insufficient in law (R. 53–54). The court, after hearing, granted the motions to strike the pleas (R. 69–70).

Respondents thereupon instituted in the court below the present mandamus proceedings against petitioners, the judge of the district court and the district court, praying that they be required to reinstate the pleas in abatement and the replications thereto and to set the issues raised by the pleas for jury trial (R. 1–12). The court heard the case on the petition for writ of mandamus and petitioners' return to the show cause order (R. 56–64). On March 4, 1942, the court, without opinion, issued an order granting the relief prayed by respondents (R. 124–125).

The court subsequently granted a rehearing, and specifically ordered that it be heard before the seven circuit judges sitting *en banc* (R. 128). In an opinion rendered September 12, 1942, the court held that it had jurisdiction to issue mandamus, that the district court had erred in striking the pleas in abatement, that the facts justified intervention by mandamus, and that a writ of mandamus should issue to require petitioners to reinstate

the pleas in abatement and the replications thereto and to try the factual issues thus raised (R. 130–134).[3] An order directing that the writ of mandamus issue in accordance with the court's opinion has been stayed pending the filing of a petition for writ of certiorari and final action thereon by this Court (R. 150).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that mandamus will lie to reverse the action of the district court in striking pleas in abatement for insufficiency.

(2) In holding that the order of the district court striking pleas in abatement for insufficiency constituted a refusal to act upon the pleas.

(3) In holding that the district court erred in striking the pleas in abatement.

(4) In ordering that a writ of mandamus issue.

REASONS FOR GRANTING THE WRIT

1. The effect of the decision below is to permit use of the writ of mandamus to obtain interlocutory review of decisions on pleas in abatement, notwithstanding the fact that a defendant may not take a direct appeal.[4] Such a result would

[3] Judge Stephens did not participate in the decision (R. 134) and Judges Denman and Healy filed separate dissenting opinions (R. 135–147).

[4] An additional question to be considered is whether a ruling on a plea of abatement, other than one to the jurisdiction of the court, may afford grounds for reversal on appeal at any time, in view of the language of 28 U. S. C., Sec. 879 (R. S.

frustrate the policy which Congress has long established that there shall be no appeal from interlocutory rulings which do not dispose of the entire controversy. To permit "piecemeal disposition on appeal of what for practical purposes is a single controversy" would enfeeble "judicial administration." *Cobbledick* v. *United States*, 309 U. S. 323, 325. In particular, the momentum of criminal justice "would be arrested by permitting separate reviews of the component elements in a unified cause" (*ibid.*).

The decision below is in conflict, not only with this general principle, but with its special application to writs of mandamus. In *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, 379, this Court said in this connection:

> Least of all, can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this "would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for reexamination;" would "introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it;" would allow an appeal or writ of error upon the

Sec. 1011, 1 Stat. 84). If that Act means what it says, the policy of Congress that errors on such matters shall not be grounds for reversal is demonstrated beyond question.

same question to be "repeated, to the great oppression of the parties;" and "would subvert our whole system of jurisprudence." *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569; *Life & Fire Ins. Co.* v. *Adams*, 9 Pet. 573, 602.

2. This Court has consistently and repeatedly held that the writ of mandamus cannot be used to perform the office of an appeal or writ of error to review the judicial action of an inferior court, and that the sole function of the writ, in cases where the inferior court had jurisdiction, is to require the court to act where it has refused to do so. *Ex parte Davenport*, 6 Pet. 661; *Ex parte Newman*, 14 Wall. 152, 165–166, 169; *Virginia* v. *Rives*, 100 U. S. 313, 323; *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, 379; *In re Pollitz*, 206 U. S. 323, 331; *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 393–394.

In this case, the court below sought to justify its ruling on the ground that the district court's order striking the pleas in abatement was a refusal "to proceed to trial" (R. 131). But the order sustaining the motion to strike, like an order sustaining a demurrer, was not a refusal to try, but a final adjudication, after argument, that the pleading was insufficient in law. Such a judgment, based on the pleadings, is entitled to as much weight as an exercise of judicial discretion based upon evidence. The mandamus proceed-

ing was therefore brought, not to compel action where there had been a refusal to act, but to correct alleged error committed in the adjudication of a legal question.

The decision below, which seems to recognize that the matter was one upon which the trial court "exercised its judgment" (R. 131), thus is in conflict with the many authorities sustaining the principle referred to above, which hold that the writ cannot be used in place of an appeal as a means of correcting an error in judgment. The writ "does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed." *Ex parte Newman*, 14 Wall. 152, 169. A mandate may direct a judge "to exercise his judicial discretion or judgment, [but] without any direction as to the manner in which it shall be done" (*ibid.*). After a court or an administrative body has exercised its judgment, the result of an issuance of the writ would not be to compel the court "to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action." *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 394.

3. Under Section 262 of the Judicial Code a circuit court of appeals has jurisdiction to issue extraordinary writs only when they are auxiliary to appeals or in aid of appeals and not when it is sought to use them in lieu of the ordinary appellate processes. See Brief for the Government in *Adams et al.* v. *United States ex rel. McCann,* No. 79, this Term, Point I–A, pages 17–33. In the instant case, even more clearly than in the *McCann* case,[5] the application for the writ was made not to aid appellate jurisdiction otherwise existing, but as a substitute for an appeal.

4. Inasmuch as the decision below opens a new avenue for the review of interlocutory decisions, its effect on the administration of criminal justice would be serious. The issue presented is thus one of public importance.[6]

CONCLUSION

The decision below is in conflict with applicable decisions of this Court and establishes a precedent

[5] In the instant case no appeal had been taken, nor would one lie, from the interlocutory order.

[6] In criminal cases such pleas are usually grounded on alleged irregularities in the grand jury proceedings. Because of the secrecy attaching to grand jury proceedings, defendants are seldom able to make the requisite specific allegations of error and, as dissenting Judge Healy declared, "their pleas in abatement contemplate nothing more nor less than a fishing expedition into the proceedings had before the grand jury relative to their case" (R. 147). Unless the district courts strictly construed such pleas, the accused would, in advance of trial, frequently "obtain access to wholly privileged material" (*ibid*).

which, if generally followed, would seriously obstruct the administration of criminal justice in the federal courts. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

DECEMBER 12, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

FILE COPY

FILED
MAR 24 1943
CHARLES ELMORE CROPLEY
CLERK

No. 584

In the Supreme Court of the United States

OCTOBER TERM, 1942

HONORABLE MICHAEL J. ROCHE, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, PETITIONERS

v.

EVAPORATED MILK ASSOCIATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 584

HONORABLE MICHAEL J. ROCHE, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, PETITIONERS

v.

EVAPORATED MILK ASSOCIATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 130) is reported in 130 F. (2d) 843.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 12, 1942 (R. 148, 149). Petition for certiorari was filed De-

cember 12, 1942, and was granted February 8, 1943 (R. 152). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the court below was authorized to issue a writ of mandamus to the district court to correct its alleged error in ruling upon the sufficiency of respondents' pleas in abatement.

(2) Whether the district court's order striking respondents' pleas in abatement was correct.

STATUTES INVOLVED

Section 262 of the Judicial Code (28 U. S. C., Sec. 377) provides in part:

> The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 128 (a) of the Judicial Code (28 U. S. C., Sec. 225 (a)) provides in part that:

> The circuit courts of appeals shall have appellate jurisdiction to review by appeal final decisions. * * *

Section 284 of the Judicial Code (28 U. S. C., Sec. 421) provides in part:

> A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any

grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months: *Provided,* That, for good cause shown, the court may, at any time after the end of the term for which the grand jury was originally summoned, excuse any member of the grand jury and summon and impanel another person in his place. * * *

STATEMENT

An indictment returned in June 1941 in the United States District Court for the Northern District of California, Southern Division, in a case entitled *United States of America* v. *Evaporated Milk Association, et al.*, charged respondents and certain other defendants with conspiring to fix the prices of evaporated milk sold in certain states and territories, in violation of Sections 1 and 3 of the Sherman Act (R. 12–21). The indictment stated that the grand jury which returned the indictment had been impaneled at the November 1940 Term of court, that it had "begun but not finished during said November 1940 Term of said Court, an investigation of the matters charged in this indictment," and that, by order of the court, it had continued to sit during the March 1941 Term for the sole purpose of finishing investigations begun but not completed during the November Term (R. 12–13).

In September 1941, respondents filed pleas in abatement[1] asking that the indictment returned against them be quashed (R. 34–48). The pleas averred, on the basis of the minutes of the grand jury for its meeting of February 27, 1941, that no investigation of any matter mentioned in the indictment had been "begun" by the grand jury, within the meaning of Section 284 of the Judicial Code, during the November 1940 Term of court, which expired March 2, 1941. In fact, the very

[1] Respondents in their brief in opposition to certiorari questioned the propriety of referring to their pleas as pleas in abatement and asserted that the pleas went to the jurisdiction of the court. In the court below, both the majority opinion and the two dissenting opinions referred to the pleas as pleas in abatement (R. 130, 131, 135, 147).

While the proper nomenclature for respondents' pleas is probably not of importance in this case, we submit that they are true pleas in abatement. Such pleas are used to avoid and abate an indictment illegally found. A plea to the jurisdiction attacks the jurisdiction of the court either over the offense or over the location at which it was committed. 4 *Blackstone Commentaries* 333. Since such a plea is preliminary to any objection to the proceeding itself and aims to show that there is no necessity for any defense (1 Chitty, *Criminal Law* (1st Amer. Ed., 1841, 436) and since it pleads grounds for refusal to answer in the court in which the action is brought rather than grounds for abating the action, it does not properly conclude, as did respondents' pleas (R. 41, 46), with a prayer that the indictment be quashed (Stephen, *Principles of Pleading* (3d Amer. Ed., 1892), Appendix xxii). When a plea to the jurisdiction is sustained "the indictment may not be dismissed" and the court orders the defendants discharged from custody. *United States* v. *Schouweiler*, 19 F. (2d) 387, 388 (S. D. Calif.)

[2] R. 39–40, 42–43, 44–46.

minutes relied on stated the contrary, namely, that investigation was begun of several industries, including Canned and Evaporated Milk. (R. 33–34, 44. See pp. 38–39, *infra*.) The Government filed replications in the nature of general denials to these pleas (R. 51–52) but later, with leave of court, withdrew its replications and filed motions to strike the pleas in abatement (R. 52–55). The grounds for these motions were that the pleas did not state specific facts with sufficient certainty, that the facts alleged could not be within the pleaders' own knowledge, and that the pleas were insufficient in law (R. 53–54). The court, after hearing, granted the motions to strike the pleas (R. 69–70).[1]

Respondents thereupon instituted in the court below the present mandamus proceedings against petitioners, the judge of the district court and the district court, praying that they be required to reinstate the pleas in abatement and the replications thereto and to set the issues raised by the pleas for jury trial (R. 1–12). The court heard the case on the petition for writ of mandamus and the return to the show cause order (R. 56–64). On March 4, 1942, the court, without opinion,

[1] With respect to the first, second, and third pleas of respondent Carnation Company, the Government filed a demurrer rather than a motion to strike (R. 54). The demurrer was granted (R. 70). Respondents application for a writ of mandamus refers only to the motion to strike (R. 9–12).

issued an order granting the relief prayed by respondents (R. 124–125).

The court subsequently granted a rehearing and specifically ordered that it be heard before the seven circuit judges sitting *en banc* (R. 128). In an opinion rendered September 12, 1942, the court, with two judges dissenting and one not participating in the decision (R. 134, 135–146, 147), held that it had jurisdiction to issue mandamus, that the district court had erred in striking the pleas in abatement, that the facts justified intervention by mandamus, and that a writ of mandamus should issue to require petitioners to reinstate the pleas in abatement and the replications thereto and to try the factual issues thus raised (R. 130–134). The court did not decide whether this trial should be before a jury (R. 134). An order directing that the writ of mandamus issue in accordance with the court's opinion has been stayed pending the filing of a petition for writ of certiorari and final action thereon by this Court (R. 150).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that mandamus will lie to reverse the action of the district court in striking pleas in abatement for insufficiency.

(2) In holding that the order of the district court striking pleas in abatement for insuf-

ficiency constituted a refusal to act upon the pleas.

(3) In holding that the district court erred in striking the pleas in abatement.

(4) In ordering that a writ of mandamus issue.

SUMMARY OF ARGUMENT

I

A. The District Court's ruling that respondents' pleas in abatement were insufficient in law was an exercise of the court's judicial discretion, not a refusal to adjudicate. It is settled that a writ of mandamus cannot be used to perform the office of an appeal to review the judicial action of an inferior court taken in a matter within its jurisdiction. Here the District Court undoubtedly had jurisdiction to pass upon the sufficiency of the pleas in abatement. The issue raised did not become "jurisdictional" because the court struck the pleas as insufficient instead of letting them go to the jury. Respondents are thus seeking to use the extraordinary process of mandamus, not to compel action by the proper tribunal, but for the purpose of correcting alleged error by requiring a court to act in a particular way.

B. Even if an issue is regarded as jurisdictional, mandamus will not lie where a remedy by the ordinary processes of appeal is available. It is also clear that if appellate review is expressly

prohibited by statute, the statute cannot be evaded through the use of mandamus in lieu of appeal. In the instant case, unless R. S. 1011 stands in the way, respondents may present their contentions with respect to the pleas in abatement to the appellate courts after the trial on the merits. The fact that such a trial may put them to expense and inconvenience does not entitle them to review at an intermediate stage of the proceedings. If, on the other hand, R. S. 1011 is interpreted as prohibiting reversal on appeal, its policy cannot be nullified by resort to mandamus.

C. Apart from certain specified exceptions, circuit courts of appeals have jurisdiction to review only "final decisions" of district courts. The object of this restriction is to forbid piecemeal disposition of cases on appeal, and to avoid the harassment and costs of a succession of separate appeals from interlocutory rulings. *Cobbledick v. United States*, 309 U. S. 323. The prevention of dilatory appeals is particularly important to the effective administration of criminal justice. The statutory limitation upon the jurisdiction of the circuit courts of appeals cannot be overcome by using the writ of mandamus as a means of appealing from nonfinal orders.

D. Section 262 of the Judicial Code authorizes circuit courts of appeals only to issue writs "which may be necessary for the exercise" of their appellate jurisdiction. In the instant case, no showing can be made that the striking of respond-

ents' pleas in abatement will defeat or in any other way impair the exercise of any jurisdiction which the circuit court of appeals may possess.

II

A. The facts set forth in respondents' pleas do not adequately aver noncompliance with the provisions of Section 284 of the Judicial Code. The allegations that the grand jury had not begun its investigation of matters covered by the indictment during the November 1940 Term were made solely on the basis of the grand jury minutes, and these state precisely the contrary.

B. Where a grand jury duly impaneled and duly extended to a second term returns an indictment in a matter investigation of which was not begun during its first term, this is not ground for abating the indictment. The object of the limitation upon the functions of a grand jury during an extended term was to protect the jurors, and not those accused. Insofar as defendants are concerned, the limitation should be regarded as directory and not mandatory.

ARGUMENT

I

The Court Below Was Without Authority to Issue Mandamus in This Case

The jurisdiction of circuit courts of appeals is wholly statutory and their power to issue writs of mandamus is derived from Section 262 of the

Judicial Code. This section (*supra*, p. 2) authorizes the circuit courts of appeals to issue writs not specifically provided for by statute, such as the writ of mandamus, which may be "necessary for the exercise of" their jurisdiction and "agreeable to the usages and principles of law." We shall show that the issuance of the writ in this case was not "agreeable to the usages and principles of law" (1) because the writ cannot be used to review an exercise of judicial discretion in a case in which the trial court has neither refused to act where it should have, nor acted in a manner beyond its jurisdiction (*infra*, pp. 11–19); (2) because, in any event, the writ will not issue where there is a remedy available through the ordinary process of appeal, or where a statute prohibits review of an order by appeal (*infra*, pp. 19–30); and (3) because the limitation of the appellate jurisdiction of the circuit courts of appeals to "final decisions" precludes use of mandamus to review interlocutory orders (*infra*, pp. 30–33). Furthermore, the issuance of the writ was not "necessary for the exercise" of the appellate jurisdiction of the court below (*infra*, pp. 34–37). For all of these reasons the issuance of the writ in this case violated both the basic principles as to the nature of mandamus, and the limitation that this extraordinary writ may not be employed as a substitute for ordinary appellate procedure.

A. THE THEORY UPON WHICH THE COURT BELOW ISSUED MANDAMUS VIOLATES THE PRINCIPLE THAT MANDAMUS WILL NOT ISSUE TO AN INFERIOR COURT, ACTING WITHIN ITS JURISDICTION, TO REVIEW ITS JUDICIAL ACTION OR ITS EXERCISE OF JUDICIAL DISCRETION

This Court has consistently and repeatedly held that a writ of mandamus cannot be used to perform the office of an appeal or writ of error to review the judicial action of an inferior court and that, in cases where the inferior court had jurisdiction and was not exceeding its statutory powers, the sole function of the writ is to require the court to act where it has refused to do so. *Ex parte Davenport*, 6 Pet. 661; *Ex parte Newman*, 14 Wall. 152, 165–166; *Virginia v. Rives*, 100 U. S. 313, 323; *American Construction Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372; *In re Pollitz*, 206 U. S. 323, 331; *Interstate Commerce Commission v. United States*, 289 U. S. 385, 393–394. In *Ex parte Newman*, 14 Wall. 152, 169, this Court, in refusing to issue a writ of mandamus, said:

> Superior tribunals may by mandamus command an inferior court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed. If the duty is unperformed and it be judicial in its character the mandate

> will be to the judge directing him to exercise his judicial discretion or judgment, without any direction as to the manner in which it shall be done, or if it be ministerial, the mandamus will direct the specific act to be performed.

In *In re Pollitz*, 206 U. S. 323, 331, this Court said:

> But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.
>
> Where the court refuses to take jurisdiction of a case and proceed to judgment therein, when it is its duty to do so and there is no other remedy, mandamus will lie unless the authority to issue it has been taken away by statute. * * *

In the present case it is clear that the District Court did not refuse to take jurisdiction or to exercise its judicial discretion. On the contrary, the motions to strike the pleas in abatement were fully argued before the court (R. 70), and the court acted judicially in passing upon them.[1]

[1] For the reasons set forth in Point II, *infra*, pp. 38–45, we think the District Court's decision was correct. But in any event, we believe that that argument and the reasoning of the opinions of the two dissenting judges below (R. 135–137, 147) demonstrate indubitably that the decision was not unreasonable or an abuse of discretion.

is thus obvious that the substance of respondents' objection is not that the court refused to act, or that the motions to strike were heard before the wrong tribunal, but that its decision was erroneous. The purpose and effect of the writ is to compel the court to determine the motions "in a particular way"—that is, to deny them.

Plainly, "if the mandamus were to stand, the result would not be to compel the [court] to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action." *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 394.

The court below sought to justify its granting of mandamus upon the ground that the district court's order striking the pleas in abatement was a refusal "to proceed to trial" (R. 131). The court relied upon cases holding that where a trial judge refuses to perform a duty imposed by law he can be compelled by mandamus to do so even though his refusal was an exercise of judgment (R. 131–132). This can be conceded for pur-

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[1] *Barber Asphalt Paving Co.* v. *Morris*, 132 Fed. 945 (C. C. A. 8).

poses of this case.[6] But it is clear that the order sustaining the motions to strike, like an order sustaining a demurrer, was not a refusal to try but an adjudication that respondent's pleas were insufficient in law. Such a judgment, based on the pleadings, is entitled to as much weight as is an exercise of judicial discretion, based upon evidence. The mandamus proceeding was thus brought, not to compel action where there had been a refusal to act, but to correct alleged error committed in the adjudication of a legal question.

Respondents argue that the questions raised involve the jurisdiction of the District Court, and cite cases holding that mandamus is the proper remedy when a court or judge has no jurisdiction over a subject matter, as when a single judge is proceeding to try a case which is required to be heard before three judges.[7] As most closely in point, respondents apparently rely on the cases in which mandamus has been used to require a case to be tried before a jury rather than by an equity court, the Court of Claims, or an auditor. *Ex parte Simons*, 247 U. S. 231; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86; *Ex parte Peterson*, 253 U. S. 300. Those cases, however, hold only that mandamus lies to prevent

[6] But see *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, 380.

[7] *Ex parte Bransford*, 310 U. S. 354, 355; *Ex parte Northern Pac. R. Co.*, 280 U. S. 142; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 16.

trial in the wrong tribunal, or the wrong kind of tribunal, a trial without a jury being treated as a different kind of trial than one with a jury.

We shall assume, for purposes of argument, that respondents would be entitled to trial by jury, rather than by the court, of facts alleged in their pleas if the allegations were sufficient. The court below left this question open, and it is by no means clear that jury trial is required, particularly since the issue could not be raised on a plea of not guilty. Cf. *Ford* v. *United States*, 273 U. S. 593, 605–606; *Peper Automobile Company* v. *American Motor Car Sales Company*, 180 Fed. 245 (C. C. E. D. Mo.); but see *Jones* v. *United States*, 179 Fed. 584, 592 (C. C. A. 9). We nevertheless assume, in what follows, that there would be a jury trial on this preliminary issue of fact.

The right to trial by jury means a trial before a judge and jury as contrasted with trial before a judge alone. For in jury trials, the judge and jury together, rather than the jury alone, constitute the tribunal. *Herron* v. *Southern Pac. Co.*, 283 U. S. 91, 95. It is the function of the court to determine matters of law even when a jury is sitting. Prominent among questions which the courts have always decided is whether the pleading states a sufficient claim for relief to permit the case to go to the jury. If the court holds, on demurrer or other appropriate motion, that

no cause of action is stated, the case never goes to the jury. This does not mean that the proceeding has not been heard before the proper tribunal, for the court had jurisdiction to pass upon the legal issues. And even if the judge's ruling, which prevented the issue from reaching the jury side of the tribunal, may have been erroneous, the losing party has not been deprived of his right to trial in the appropriate forum.

Accordingly, no extraordinary remedy, such as mandamus, is available to him. If this were not so, every decision sustaining a demurrer or directing a verdict in an action at law could similarly be treated as a denial of a trial by jury, subject to correction by mandamus if the appellate court thought it erroneous. And, on the same reasoning, if the demurrer were overruled, the losing party could complain that his case was being improperly allowed to go before a jury, that this was the wrong forum, and that he too should be able to have the matter preliminarily determined by the appellate court through issuance of the extraordinary writ. Plainly neither the cases holding that mandamus will lie to protect the right to a jury trial nor those in which the writ has been exercised because a court is acting outside its jurisdiction stand for any such proposition.

Of course, respondents are not suggesting that the district court has no jurisdiction to pass upon the issues raised in the pleas in abatement. On

the contrary, the object of the proceeding for the writ is to compel the court to decide them, though after hearing evidence rather than on the pleadings. Nor do respondents assert that the district court lacked jurisdiction to pass upon the Government's motions to strike the pleas in abatement. The soundness of the points raised by the motions was undoubtedly required to be determined by the judge sitting without a jury. It is thus apparent that respondents' position is merely that the trial court erred in deciding a matter within its jurisdiction in a manner which respondents believe to have been incorrect.

Respondents confuse their claim that the grand jury lacked jurisdiction to return the indictment—which is the question raised by the pleas in abatement—with the jurisdiction of the court to pass upon the pleas. The writ of mandamus is not directed to the grand jury, but to the manner in which the court passed upon the pleas. The court had jurisdiction to pass upon the sufficiency of the pleas, whatever its decision might be. The fact that the pleas raised the question of the jurisdiction of the grand jury does not subject the court's determination on their sufficiency to correction by an appellate court through the process of the extraordinary writ of mandamus.

Furthermore, the pleas do not allege facts showing that the grand jury was without jurisdiction, or that the court would have no jurisdiction to try the offense. Respondents' pleas make no allega-

tion that the grand jury which returned the indictment had not been duly impaneled or that it had not been duly authorized to sit during the March 1941 Term within which it returned the indictment. If the grand jury failed to observe the limitation that, during the March Term, it confine itself to investigations begun during the November Term, this was at most an irregularity in the grand jury procedure,* and not conduct by a jury sitting beyond its authorized term. Nor would it destroy the jurisdiction of the Court to try the case on the merits.

This conclusion is supported by cases involving comparable objections. The asserted irregularity was similar to that which arises when the grand jury is composed of persons not qualified as grand jurors (*Kaizo* v. *Henry*, 211 U. S. 146, 149), when the method prescribed by law for the selection of grand jurors has not been followed (*Matter of Moran*, 203 U. S. 96, 103–104), when the judge who impaneled the grand jury was not within the district in which the court was located (*Harlan* v. *McGourin*, 218 U. S. 442, 451), or when there was failure to observe the statutory requirement that the foreman of the grand jury keep a record of the number of grand jurors concurring in the finding of the indictment and file this record with the clerk (*United States* v. *Par-*

* We later contend (*infra*, pp. 43–47) that an irregularity of this kind does not constitute ground for abating the indictment.

ker, 103 F. (2d) 857, 860 (C. C. A. 3), certiorari denied, 307 U. S. 642). Such irregularity is not jurisdictional.* It does not entitle the defendant to release by habeas corpus, as would be so if it deprived the court of jurisdiction to try the offense. As this Court said in *Kaizo* v. *Henry, supra*, at p. 149:

> * * * the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. That court has the authority to decide all questions concerning the constitution, organization and qualification of the grand jury, and if there are errors in dealing with these questions, like all other errors of law committed in the course of the proceedings, they can only be corrected by writ of error.

Ex parte Bain, 121 U. S. 1, upon which respondents rely, involved a wholly different situation. In that case the district court, on motion of the Government, assumed to amend the indictment. The defendant was tried and sentenced upon this "amended" indictment for an offense for which, under the Constitution, he could be tried only upon indictment by a grand jury.

* The irregularities in the cases cited involved statutory provisions designed to protect defendants. The limitation upon matters to be considered by a grand jury during an extension of its term had no such purpose (see pp. 47–48, *infra*), and there is no reason to assume that a defendant will be prejudiced by having his case come before one grand jury rather than another.

Since the "amended" indictment had not been returned by a grand jury, it gave the court no jurisdiction to try the defendant and he was entitled to obtain his release by habeas corpus.

B. MANDAMUS DOES NOT LIE BECAUSE (1) A REMEDY BY APPEAL IS AVAILABLE, OR (2) THE STATUTORY PROHIBITION AGAINST REVERSAL BY APPELLATE COURTS FOR ERRORS IN RULING ON PLEAS IN ABATEMENT PRECLUDES REVERSAL THROUGH USE OF MANDAMUS

For the reasons set forth in the preceding section, we think it clear that the remedy of mandamus does not apply to the situation here presented. In addition, even if this case could be regarded as one to compel a court to "proceed to trial" or to recognize a party's right to a jury trial rather than one before a court sitting without a jury, it would have been erroneous to have issued the writ. This follows from two recognized limitations upon the right to mandamus. In the first place, the remedy is not available if the point can be brought before the appellate court through ordinary processes of appeal. Secondly, if it cannot be heard on appeal by reason of an express statutory prohibition, appellate review in violation of the policy of the statute cannot be obtained through the use of the writ of mandamus.

In the court below a considerable portion of the argument turned on the effect of R. S. 1011 (28 U. S. C., Sec. 879), which provides that:

> There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact.

The Government contended that this section *precluded the circuit court of appeals from* reversing the district court on its ruling on the plea in abatement. Respondents argued that this case came within the exception for "pleas to the jurisdiction of the court," that the entire section was inapplicable to criminal cases,[20] and that the section was in part superseded by the Act of May 9, 1942, 56 Stat. 271 (18 U. S. C., Sec. 682), allowing the United States to appeal from decisions on pleas in abatement.

Since, in view of the two principles to which we have referred, mandamus does not lie in either event, we do not continue the controversy as to whether R. S. 1011 is applicable. If respond-

[20] In a number of criminal cases the courts have, on appeal, reviewed the correctness of a trial court's ruling on a plea in abatement without reference to R. S. 1011. See p. 23, n. 14. But in at least three criminal cases the section has been cited as barring appellate review of rulings on pleas in abatement. *Biemer* v. *United States*, 54 F. (2d) 1045 (C. C. A. 7), certiorari denied, 286 U. S. 566; *Mounday* v. *United States*, 225 Fed. 965, 967 (C. C. A. 8), certiorari denied, 239 U. S. 645; *Luxenberg* v. *United States*, 45 F. (2d) 497, 498 (C. C. A. 4), certiorari denied, 283 U. S. 820. This Court has also referred to the section in a criminal case as preventing reexamination of "questions of fact" upon writ of error. *Miles* v. *United States*, 103 U. S. 304, 313.

ents were right in their contention below, they can challenge the district court's decision on the pleas in abatement through the ordinary processes of appeal, as any error on an interlocutory matter can be raised on appeal from an adverse final judgment. If this can be done, mandamus will not lie because the point, whether or not jurisdictional, can be tested on appeal. If, on the other hand, R. S. 1011 prohibits reversal on appeal, the section cannot be evaded through permitting appellate reversal on mandamus.

1. *Mandamus does not lie where a remedy through the ordinary processes of appeal is available.*

If R. S. 1011 does not stand in the way, respondents may correct the alleged error in ruling on the pleas in abatement on appeal after trial of the case. On appeals from judgments of conviction in federal district courts, the appellate courts have often considered whether the trial court erred in striking or sustaining demurrers to pleas in abatement.[11] Many cases have recognized that appeal after trial and final decision is an adequate remedy and that mandamus is not available if there is such remedy, irrespective of

[11] *Atyeo* v. *United States*, 165 U. S. 36, 43–45; *Hyde* v. *United States*, 225 U. S. 347, 373–374; *Olmstead* v. *United States*, 19 F. (2d) 842, 845 (C. C. A. 9), affirmed, 277 U. S. 438; *Shushan* v. *United States*, 117 F. (2d) 110, 113 (C. C. A. 5), certiorari denied, 313 U. S. 574; *United States* v. *Johnson*, 123 F. (2d) 111, 117–120 (C. C. A. 7), now before this Court on writ of certiorari, No. 4, this Term.

whether the question presented is jurisdictional.[12] *Ex parte Baltimore & O. R. Co.*, 108 U. S. 566; *Ex parte Harding*, 219 U. S. 363; *Ex parte Oklahoma*, 220 U. S. 191, 209–210; *Ex parte Metropolitan Water Company*, 220 U. S. 539; *Ex parte Roe*, 234 U. S. 70; *Ex parte Park Square Automobile Station*, 244 U. S. 412, 415; *Ex parte Slater*, 246 U. S. 128; *Ex parte Tiffany*, 252 U. S. 32, 37; *Ex parte Riddle*, 255 U. S. 450; *Stratton v. St. Louis S. W. Ry.*, 282 U. S. 10, 16.

Illustrative of these decisions is *Ex parte Park Square Automobile Station*, 244 U. S. 412. In that case the federal court for the Northern District of New York refused to remand a case removed to it from a state court in New Hampshire. Despite the rather clear lack of jurisdiction of the New York court, this Court refused to issue mandamus. The fact that the petitioner would be forced to try its case "at great inconvenience and expense as a preliminary to securing a review of the question of jurisdiction" did not "qualify or

[12] We are not here concerned with the special situation in which a case is being heard by a judge barred by statute from exercising jurisdiction and an important public policy embodied in the statute would be defeated by the very progress of the trial before the wrong tribunal. Thus the public interests safeguarded by the acts requiring certain important classes of cases to be heard by three judges would be frustrated if the cases were permitted erroneously to proceed to trial before one judge. *Ex parte Bransford*, 310 U. S. 354. But, as we shall show, the mere inconvenience and expense of a trial are not sufficient to bring a case within this special category.

limit the comprehensive rule * * * that, where statutory methods of review of questions of jurisdiction were provided for, * * * there was no power to override the statutory provisions by resorting to the writ of mandamus" (244 U. S., at 415). The reasons of policy which underlie this rule were stated as follows (p. 416):

> * * * however grave may be the inconvenience arising in this particular case in the construction which the court gave to the statute and upon which it based its assertion of jurisdiction, greater inconvenience in many other cases would necessarily come from now departing from the established rule and reviewing the action of the court by resort to a writ of mandamus instead of leaving the correction of the error to the orderly methods of review established by law.

Respondents rely on "special circumstances" as warranting the granting of the writ.[13] Apart from general and argumentative assertions,[14] the only peculiar circumstance mentioned is that "if the parties are remitted to relief on appeal from a final judgment, they and the courts will be sub-

[13] See brief on rehearing in the court below, p. 18.

[14] In their brief on rehearing below (p. 18), respondents listed as among the "special circumstances" upon which they relied: (a) That the action of the trial court has denied petitioners the right to trial by jury; (b) that the questions presented involve matters of public importance in the administration of justice; (c) that the matters presented involve the jurisdiction of the trial court; (d) that the action is a criminal as distinguished from a civil proceeding.

jected to the burden of a long and expensive trial," which would have been unnecessary if the pleas in abatement had been sustained. But there is nothing unusual about this situation. In any case which will take time to try, the parties would be saved inconvenience and expense if all erroneous rulings could be taken to the highest appellate court before trial on the merits. But Congress and the Federal courts have never ventured to assume that preliminary rulings are erroneous and that immediate review would therefore be expeditious. It is unnecessary to elaborate upon the delays which would ensue if litigants could appeal interlocutory rulings on motions while a case was pending in the trial court. See *Cobbledick* v. *United States, infra,* p. 31.

No different policy is warranted for this case, or other antitrust cases, merely because a long trial is anticipated. The desirability, from the standpoint of the public interest, of expedition in antitrust litigation has been explicitly recognized by Congress (Act of February 11, 1903, as amended, 32 Stat. 823, 36 Stat. 854, 1167, 15 U. S. C., Sec. 28), and although the trial may be expensive and time consuming, we dare say that the burden on these respondents will be no greater than that of a relatively short trial upon defendants with lesser resources.[15] Since many antitrust trials are lengthy, on respondents' theory the de-

[15] On this point, see the dissenting opinion of Judge Denman, R. 145–146.

fendants in such cases would have open to them means of delaying final decision not generally available to litigants.

The effect of such special circumstances, when ordinary appellate review was available, was expressly considered in the *Park Square* case, *supra*. It was there held that a "special" circumstance was necessary to permit mandamus even when "no means of review" were provided; but that the existence of facts of precisely the same kind as are urged upon the court here [16] did not warrant disregard of the ordinary statutory methods of review.

Respondents cite *Ex parte Simons*, 247 U. S. 231, *Ex parte Peterson*, 253 U. S. 300, and *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, as holding that preliminary questions may be determined on mandamus in order to avoid putting a party to "the difficulties and the courts to the inconvenience" of proceeding on a basis which might ultimately be found to be mistaken.[17] These three decisions are based on a rather cryptic utterance of Mr. Justice Holmes in the earliest of them, the *Simons* case. The three sentences he devoted to

[16] It was there claimed that the case was exceptional because of "the clearly erroneous construction" of the statute by the court below and the strange result, and because of the "great inconvenience and expense * * * which would result from forcing the petitioner to try its case" in the wrong court before the Court's jurisdiction could be tested on appeal.

[17] These cases are relevant here only if they are not basically distinguishable as involving trials before the wrong tribunal. See pp. 14–15, *supra*.

the point contained no reference to any of the considerations just discussed, or to the *Park Square* case, which held precisely the contrary at the preceding term. The three cases appear to be out of line with the general doctrine, approved in prior and subsequent decisions and supported both by statutory and policy considerations, that mandamus will not lie if a remedy by way of appeal is available, even though a contrary result may be more convenient and economical for a party in a particular case.

It may be of significance that the three decisions involve issuance of mandamus directly by this Court and not by the circuit court of appeals. The latter courts, under Section 128, have jurisdiction only over "final decisions." That section provides statutory reenforcement for the policy against obtaining review of interlocutory orders by mandamus insofar as the jurisdiction of circuit courts of appeals is concerned. See pages 31-34, *infra*. This Court is subject to no such statutory restrictions.[18] Since the present case involves

[18] Under Section 240 of the Judicial Code (28 U. S. C., Sec. 347), this Court may review by certiorari any case pending in a circuit court of appeals before or after decision by that court and irrespective of the interlocutory character of the order involved. *Gay* v. *Ruff*, 292 U. S. 25, 30. It may answer questions of law certified to it by any circuit court of appeals or by the Court of Claims. (Judicial Code, Sec. 239, 28 U. S. C., Sec. 346; Act of February 13, 1925, Sec. 3, 28 U. S. C., Sec. 288.) It may review on direct appeal a number of different types of interlocutory judgments or decrees of district courts. (Section 238, Judicial Code, 28 U. S. C., Sec. 345.)

the power of a circuit court of appeals to issue mandamus, the three cases under discussion may be distinguished on the ground that they were not governed, as is the case at bar, by Section 128. Moreover, inasmuch as they were civil cases, and the present case is criminal, they may be distinguished on the grounds pointed out in the *Cobbledick* case (*infra*, p. 31) that the "considerations of policy" against allowing interlocutory appellate review "are especially compelling in the administration of criminal justice" (309 U. S., at 325). The *Simons*, *Peterson*, and *Skinner & Eddy* cases should at least be held inapplicable to criminal cases and to the issuance of writs by circuit courts of appeals.

2. *Mandamus does not lie where a statute prohibits review by way of appeal*

If R. S. 1011, *supra*, p. 20, should be interpreted as preventing appellate review of the rulings of the trial court on pleas in abatement, the court will not permit such a statutory requirement to be nullified by resort to mandamus instead of appeal. The object of the statute, thus interpreted, would be to prevent such pleas, which are not looked upon with favor, from delaying or otherwise unduly interfering with the trial of cases. This objective would be completely defeated if parties were permitted to present the same questions to an appellate court in a proceeding bearing another name.

In a similar situation, where Congress has provided that there shall be no appeal from orders remanding proceedings to state courts, this Court has repeatedly held that the statutory prohibition against appeals takes away the right to mandamus. *In re Pennsylvania Company*, 137 U. S. 451, 454; *Fiske* v. *Henarie*, 142 U. S. 459, 468; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556, 581; *McLaughlin Bros.* v. *Hallowell*, 228 U. S. 278; *Ex parte Matthew Addy S. S. & C. Corp.*, 256 U. S. 417; *Employers Reins. Corp.* v. *Bryant*, 299 U. S. 374, 378–381. Cf. *In re Burdett*, 127 U. S. 771.[19] In holding, in the *Pennsylvania Company* case, *supra*, that it was without power to issue mandamus in such cases, the Court said:

> In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The gen-

[19] See also *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 394, where the court said with respect to nonreviewable orders of the Interstate Commerce Commission: "A dissatisfied complainant is not permitted to escape these limitations indirectly by broadening the functions of mandamus when he is barred from more direct review. *I. C. C.* v. *Waste Merchants Ass'n*, *supra*, p. 35. There have been like attempts before in other branches of the law of remedies. * * * They have met with no success."

> eral object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words "such remand shall be immediately carried into execution," in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.

Although different kinds of motions are involved, the considerations which prompted Congress to prohibit appeals from orders of remand are undoubtedly akin to those responsible for a similar prohibition with respect to pleas in abatement. The reasoning of the above decisions holding that a statutory ban upon appeals applies to mandamus clearly is applicable to R. S. 1011 as well as to Section 28 of the Judicial Code.

C. THE COURT BELOW WAS NOT AUTHORIZED TO CIRCUMVENT, BY GRANT OF MANDAMUS, THE POLICY ESTABLISHED BY CONGRESS, THAT CIRCUIT COURTS OF APPEALS SHOULD HAVE JURISDICTION TO REVIEW ONLY "FINAL" DECISIONS OF DISTRICT COURTS

Apart from certain specified exceptions,[20] circuit courts of appeals have jurisdiction to review only "final decisions" of district courts.[21] This policy of permitting circuit courts of appeals to review only final decisions has been an integral part of the federal judicial system from the outset. The reasons underlying this policy, and their particular importance as applied to criminal cases, have been recently stated in *Cobbledick* v. *United States*, 309 U. S. 323, 324–326, as follows:

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided

[20] See Section 129, Judicial Code (28 U. S. C., Sec. 227).
[21] Section 128 (a), Judicial Code (28 U. S. C., Sec. 225).

> the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases. An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. *Cogen* v. *United States*, 278 U. S. 221.

These considerations are clearly applicable to the case at bar. The statute limiting circuit courts of appeals to review of final decisions would be circumvented and flouted if litigants could employ the writ of mandamus to review interlocutory orders of district courts. If the decision below is upheld in the present case every ruling striking

a plea in abatement or other preliminary plea, as well as every order overruling a demurrer to an indictment, would lay the basis for application for mandamus to the appropriate circuit court of appeals.

American Construction Co. v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, is directly in point. The question there was whether this Court could issue mandamus to a Circuit Court of Appeals with respect to orders made by that court at an intermediate stage of a case. At that time, under R. S. 691 and 692, "the appellate jurisdiction of this court from the Circuit Court of the United States was limited to final judgments at law, and final decrees in equity or admiralty. Acts of September 24, 1789, c. 20, §§ 13, 22, 1 Stat. 81, 84; March 3, 1803, c. 40, 2 Stat. 244; Rev. Stat. §§ 691, 692" (p. 378). In refusing to issue the writ, this Court said (p. 379):

> Least of all, can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this "would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for reexemination"; would "introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it"; would allow an appeal or writ of error upon the same question to be "repeated, to the great

> oppression of the parties"; and "would subvert our whole system of jurisprudence." *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569; *Life & Fire Ins. Co.* v. *Adams*, 9 Pet. 573, 602.

With respect to criminal procedure, Congress has left no doubt that interlocutory review is meant to be prohibited unless expressly authorized. When the Court of Appeals of the District of Columbia construed legislation for the District as permitting interlocutory criminal appeals, Congress promptly legislated to the contrary. Act of July 3, 1926, c. 755, 44 Stat. 831, 18 U. S. C., sec. 683. See *Sinclair* v. *United States*, 273 U. S. 737, 741. The House Committee on the Judiciary on that occasion stated (H. Rep. 1363, 69th Cong., 1st Sess.):

> Delay in criminal cases is already a grave subject of general criticism and to allow appeals in interlocutory matters would serve to bring the administration of criminal law into greater discredit.

The Senate Committee stated (S. Rep. 926, 69th Cong., 1st Sess.):

> * * * No such procedure is authorized or tolerated in the Federal system generally; * * *. Promptness in the dispatch of the criminal business of the courts is by all recognized as in the highest degree desirable. Greater expedition is demanded by a wholesome public opinion. If there is error

> in the action of the court in any interlocutory order, it may be reviewed on appeal from the final judgment. * * *

D. THE COURT BELOW WAS NOT AUTHORIZED TO ISSUE A WRIT OF MANDAMUS BECAUSE SUCH WRIT WAS NOT "NECESSARY" FOR THE EXERCISE OF THAT COURT'S APPELLATE JURISDICTION

Section 262 of the Judicial Code, from which circuit courts of appeals derive their power to issue writs of mandamus, authorizes district courts, circuit courts of appeals, and this Court to issue writs not specifically provided for by statute, "which may be necessary for the exercise of their respective jurisdictions."[22] In the case of circuit courts of appeals, this means writs which may be necessary for the exercise of *appellate* jurisdiction. *Whitney* v. *Dick*, 202 U. S. 132, 137, held that under Section 262 circuit courts of appeals have no authority to issue the auxiliary writs of habeas corpus and certiorari "except in cases where it [such writ] may be necessary for the exercise of a jurisdiction already existing." See *Adams* v. *McCann*, No. 79, decided December 21, 1942. But this interpretation of Section 262 would seem to have been qualified by *McClelland* v. *Carland*, 217 U. S. 268, which held that if the

[22] The Supreme Court, although not circuit courts of appeals, is authorized to issue mandamus by Section 234 of the Judicial Code (28 U. S. C., Sec. 342), which does not contain the above restrictive phrase. The power of this Court to issue mandamus might thus be broader than that of the circuit courts of appeals.

action of the district court "might prevent the adjudication of the questions involved, and thereby prevent a review thereof in the Circuit Court of Appeals," issuance of mandamus would be in aid of exercise of the appellate jurisdiction of the circuit court of appeals and therefore authorized. This Court said (p. 280):

> There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below. * * *

See also *Ex parte United States*, 287 U. S. 241, 246.

If the prohibition in R. S. 1011 against reversal by appellate courts applies to this case, circuit courts of appeals would have no appellate jurisdiction to protect;[22] issuance of a writ in such circumstance would clearly be unauthorized. *Federal Power Comm'n* v. *Metropolitan Edison Co.*, 304 U. S. 375. The remainder of our discussion on this point will assume that R. S. 1011 is not applicable.

[22] The fact that under the Criminal Appeals Act, as amended May 9, 1942, the court might have jurisdiction of an appeal by the Government if a plea in abatement were sustained does not enlarge its jurisdiction to reverse such pleas when they are not sustained. In the latter case, which is the situation at bar, the circuit court of appeals would still have no appellate jurisdiction over the plea.

Where an appeal in a case is pending before a circuit court of appeals, that court *is* vested with appellate jurisdiction, and under these circumstances determination of what writs are "necessary for" the exercise of that jurisdiction calls for a construction of the statute to the end that auxiliary writs be employed to achieve the ends of justice. *Adams* v. *McCann*, No. 79, this Term, decided December 21, 1942. But in the present case no appeal was pending before the court below when respondents applied for mandamus, so that this basis for jurisdiction present in the *McCann* case is lacking.

McClelland v. *Carland* indicates that a court may have appellate jurisdiction over a case which may, but has not yet, come before it. But the same decision shows that the possibility that a case may eventually reach, and thereby come within the appellate jurisdiction of, a circuit court of appeals is not in itself sufficient to justify the issuance of mandamus. Even where this is so, mandamus will not lie except where issuance of the writ is "necessary for the exercise of" the appellate jurisdiction, which means that it must in some way serve to aid or protect the jurisdiction of the appellate court.

No such showing can be made in the case at bar. The striking of the pleas would not stop the trial from going on or prevent respondents from appealing from a judgment of conviction. The

questions presented by the pleas could be reviewed on that appeal, just as are other interlocutory rulings of the trial court. The striking of the pleas would thus not prevent review of the questions they raise or in any other way defeat or impair the effectiveness of the exercise of appellate jurisdiction by the circuit court of appeals. Accordingly, the issuance of the writ cannot be regarded as in aid of or otherwise necessary to the jurisdiction of that court.

II

If It Be Assumed *Arguendo* That the Court Below Was Authorized To Issue Mandamus in This Case, the District Court's Order Striking Respondents' Pleas in Abatement Was Correct and Mandamus Should Therefore Have Been Denied.

A. The facts set forth in respondents' pleas do not adequately show noncompliance with the provisions of section 284 of the Judicial Code.

The court below has itself recognized that "it is uniformly held that a plea in abatement to an indictment, being a dilatory plea and not favored in law, must be pleaded with strict exactness, and with certainty, accuracy, and completeness, and must set forth facts, and not conclusions of law, nor evidence of facts, and that every inference must be against the pleader." *Olmstead* v. *United States*, 19 F. (2d) 842, 845 (C. C. A. 9), affirmed

on other points, 277 U. S. 438. Such a plea can be relied upon as a defense only when promptly pleaded and supported by definite factual averments, and when the grounds upon which abatement is sought are shown to have prejudiced the defendants.[24]

Section 284 of the Judicial Code (*supra*, pp. 2–3) provides that a district judge may authorize any grand jury to continue to sit during the term succeeding the term for which it was impaneled "solely to finish investigations begun but not finished by such grand jury."

Two pleas in abatement are involved in the present proceeding, one by the Carnation Company and one by the other respondents. The latter plea, which we shall consider first, does not independently aver that the grand jury had not begun an investigation of matters covered by the indictment during the November 1940 term (which expired March 2, 1941), but it makes such averment solely "on the basis" of the minutes of the grand jury for its meeting of February 27, 1941. The minutes for said meeting stated (R. 33–34, 44):

> The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and

[24] *Agnew* v. *United States*, 165 U. S. 36, 43–45; *Hyde* v. *United States*, 225 U. S. 347, 373–374; *Shushan* v. *United States*, 117 F. (2d) 110, 113 (C. C. A. 5), certiorari denied, 313 U. S. 574.

> Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun. Other industries named as subject to investigation are Salmon industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland. Asparagus and Cherries.

After quoting the above, the plea makes the following averment (*ibid.*):

> The statement in said minutes, "investigation begun," with reference to the canned and evaporated milk industry is a conclusion of law, not supported by the facts stated in said minutes. *Said minutes show, and on the basis thereof said defendants allege*, that no investigation of any matter mentioned in said indictment and no investigation of any defendant joining in this plea was "begun," within the meaning of the Act of April 17, 1940 (U. S. C. 28: 421), on February 27, 1941, or at any other time during the said November 1940 term. [Italics supplied.]

The plea is therefore based entirely on minutes which not only do not support it but directly negative it, since the minutes state that during the November term the canned and evaporated milk industry was "named by witnesses and investigation begun."[25] This plea apparently first relies

[25] February 27, 1941, was during the November 1940 term, which expired on March 2, 1941 (R. 43).

on the minutes, and then denies what they aver. If the statement in the minutes, "investigation begun", is, as the plea avers, a conclusion of law, then the averment in this plea that no investigation was "begun" during the November term is equally a conclusion of law and is insufficient to support the plea.

The plea under consideration seems wholly without factual support unless it can be said that a court may take judicial notice that investigation of seven industries could not be "begun" by a grand jury, within the meaning of Section 284, on a single day. But when a witness before a grand jury brings to its attention a possible violation of law and the grand jury determines that the matter warrants further investigation, an investigation is then "begun". The "identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Blair* v. *United States*, 250 U. S. 273, 282.

The Government almost invariably makes its own investigation before presenting a violation of the antitrust laws to a grand jury. It is possible that witnesses (*e. g.*, employees of the Federal Bureau of Investigation) familiar with facts developed by the Government in its investigation of possible violations of the antitrust laws in particular industries appeared before the grand jury on February 27, 1941, and presented facts

which the grand jury considered warranted further investigation. It is also possible that these witnesses appeared before the grand jury on that date for the very purpose of giving that grand jury, then engaged in investigating possible violations of the antitrust laws in other industries, jurisdiction to investigate violations of law in these additional industries during an extended term of the grand jury. Such action would be an entirely reasonable one to meet a requirement of the law and would not in any way prejudice the rights of those who might ultimately be indicted as a result of the investigations thus begun.

The plea of the Carnation Company is similar, in character and effect, to the plea of the other respondents. The Carnation plea is composed of five separate pleas and the first three aver that the grand jury began its investigation of the matters covered by the indictment during the November term (R. 38–39). The last two aver that no such investigation was begun by the grand jury during the November term (R. 39–40); but the verification of the plea states that such averment is based on the minutes of the grand jury for its meeting of February 27, 1941, and the minutes are quoted in the verification (R. 42). The plea is thus insufficient if not supported by the minutes.

The plea of the Carnation Company and the plea of the other respondents also allege that the grand jury had not begun an investigation of any matter covered by the indictment prior to Feb-

ruary 27, 1941 (R. 40, 45–46). The pleas further allege that the order extending the term of the grand jury which was entered on February 28, 1941, recites that the matter came on to be heard at the request of the United States Attorney for an order authorizing the grand jury to continue to sit to finish "certain" investigations which it had undertaken but not finished during the November Term; that this request was filed with the court on February 26, 1941; and that the court's order of February 28 authorizing the grand jury to sit during the March term to finish "said" investigations accordingly did not include those begun on February 27 (R. 40, 45, 47, 48). We submit that both the United States Attorney's request and the court's order intended to and did embrace all unfinished investigations which had been begun by the time the court issued the requested order, and that the order of February 28, 1941, therefore covered investigations begun on February 27, 1941. We likewise submit that if there is doubt as to this conclusion, the defect in the court's order is one of form and is rendered harmless by Section 1025 of the Revised Statutes (18 U. S. C., Sec. 556), which provides that no indictment found by a grand jury, "shall be deemed insufficient * * * by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant * * *."

In short, we submit that the observations of Judge Healy in the court below are amply warranted (R. 147):

> Without at all questioning the motive of the petitoners, it is to be noted that their pleas in abatement contemplate nothing more nor less than a fishing expedition into the proceedings had before the grand jury relative to their case. Thus the accused, in advance of trial, may on purely speculative grounds obtain access to wholly privileged material. The trial judge committed no error in striking the pleas for insufficiency.

B. WHERE A GRAND JURY DULY IMPANELED AND DULY EXTENDED TO A SECOND TERM RETURNS AN INDICTMENT IN A MATTER INVESTIGATION OF WHICH WAS NOT BEGUN DURING ITS FIRST TERM, THIS IS NOT GROUND FOR ABATING THE INDICTMENT.

Respondents have not heretofore suggested any reason why the interests of those accused of crime are prejudiced if a grand jury, whose term has been extended, first begins the investigation leading to an indictment during the extended term. The legislative history of the pertinent provisions of Section 284 strongly indicates that these provisions were not enacted to confer additional protection upon those accused of crime.

Prior to the Act of February 25, 1931, 46 Stat. 1417, which amended Section 284, Judicial Code, there was no federal statute authorizing an extension of the term of a grand jury, but certain

district courts had adopted the practice of authorizing grand juries to continue to sit beyond the term for which they were impaneled, in order to complete unfinished investigations, and indictments returned by such extended grand juries had been held valid by two circuit courts of appeals and by a district court in a third circuit.[26] In 1923 the Attorney General advised Congress that he feared to risk any important case, especially one where the statute of limitations would run before the question could be settled by this Court, by retaining a grand jury beyond its term and requested that all doubts upon the subject be removed by legislation. S. Rep. No. 1189, 67th Cong., 4th Sess. The Attorney General renewed his recommendation in succeeding Congresses and the proposed legislation was enacted in 1931.[27]

The provision that the terms of grand juries might be extended solely to finish investigations begun during the term preceding extension was undoubtedly adopted in order not to impose upon grand jurors the burden of serving during more than one term of court unless such extended service would avoid the duplication in time and effort involved in presenting to a new grand jury the facts developed in an investigation which an

[26] *Elwell* v. *United States*, 275 Fed. 775, 777 (C. C. A. 7); *Johnson* v. *United States*, 5 F. (2d) 471, 473 (C. C. A. 4); *United States* v. *Rockefeller*, 221 Fed. 462, 466 (S. D. N. Y.).

[27] H. Rep. No. 366, 68th Cong., 1st Sess.; S. Rep. No. 1401, 70th Cong., 2d Sess.; S. Rep. No. 877, 71st Cong., 2d Sess.

earlier grand jury had been unable to complete. When the Act of April 17, 1940, 54 Stat. 110, changed the maximum time during which a grand jury could be required to serve from "three terms" to "eighteen months," there was added a proviso, obviously adopted for the benefit of grand jurors, that the court may at any time after the end of the term for which the grand jury was originally summoned, excuse any grand juror and summon another person in his place.

We submit that the limitation respecting unfinished investigations is directory, in the sense that if a grand jury, duly impaneled and duly extended, returns an indictment for an offense investigation of which was first begun during the extended term, this does not constitute ground for abating the indictment. This interpretation of Section 284 would not mean that the limitation as to unfinished investigation would be without effect. It would have the effect of authorizing extension of a grand jury only when, at the time of extension, it had begun but not finished an investigation. It would have the further effect that any grand jury might properly decline to begin a new investigation during its extended term.

But even if the limitation as to unfinished investigations is not thus construed to be directory, a plea that an indictment be abated because of failure to observe this limitation calls for a strict application of the rule (*supra*, pp. 37–38) that an abatement plea based upon alleged irregularity in

the grand jury procedure must be supported by an allegation of prejudice to the defendant. In the present situation, that means that respondents must prove that they were injured by having their case presented to the extended rather than to another grand jury. The pleas of the respondents make no such allegation.

CONCLUSION

It is respectfully submitted that the judgment of the circuit court of appeals should be reversed, with directions to dismiss the petition for writ of mandamus.

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No. 584

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

HONORABLE MICHAEL J. ROCHE, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, PETITIONERS,

vs.

CORPORATED MILK ASSOCIATION, ET AL.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION F A WRIT OF CERTIORARI TO THE UNITED STATES CIRC COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF THE CASE.

On June 3, 1941, an indictment was filed in the Uni States District Court charging some forty-four defe ants connected with the evaporated milk industry v violation of the Sherman Act (R. 12). These defenda are respondents on this petition for certiorari.

The case arises as follows:

The grand jury which returned the indictment was

It returned the indictment at the end of the March 1941 term (R. 3). The grand jury had no jurisdiction to return the indictment in the March term except as authorized by section 284 of the Judicial Code (28 U.S.C. 421):

> "A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request was made, **solely to finish investigations begun but not finished by such grand jury,** * * *."

Pursuant to this statute and on representations of government counsel that unfinished matters were before the grand jury, the District Court on February 28, 1941, made an order continuing the life of the grand jury into the March term for the *sole purpose* of finishing such investigations (R. 48).

The indictment, when returned, alleged that the "investigation of the matters charged in this indictment" had been "begun but not finished during said November Term of said Court" (R. 12).

The defendants filed pleas alleging that the investigation had *not* been begun at the November 1940 term (R. 34, 46). The Government always refers to these pleas as "pleas in abatement"; in fact the pleas are founded on the statute quoted above and go to the jurisdiction; they aver expressly that the grand jury had no jurisdiction to return the indictment and that the court has no jurisdiction to try the case (R. 41, 46).[1]

The Government filed replications traversing the pleas, which, of course, raised an issue of fact as to whether

[1] See *Ex parte Bain* (1887) 121 U.S. 1, 13-14, and cases in footnote 3, infra.

the investigations had or had not been commenced in the November term.

The court set the matter down for jury trial for December 3, 1941, government counsel conceding in response to a question by the court that defendants were entitled to a jury (R. 8). The trial was later continued to December 15 at the Government's request (R. 9). On December 9, however, the Government moved for leave to withdraw its replications and to make motions to strike the pleas (R. 52). The trial court granted leave as prayed and sustained the motions to strike (R. 69).

The Circuit Court of Appeals issued an alternative writ of mandate to show cause why the pleas and replications should not be reinstated and a trial had thereon (R. 55). After hearing, the court issued a peremptory writ (R. 124). Upon rehearing, before the court in banc, the court by a four to two vote adhered to its ruling (R. 130, 135, 147).

The Government then filed this petition for certiorari, the writ of mandate being stayed meanwhile (R. 149, 150).

ARGUMENT.

Petitioners make no point on this petition of the alleged formal insufficiency of the pleas (Petition, p. 2, note), which obviously presents no question of public concern.

In referring to the "Statute involved," petitioners cite only section 262 of the Judicial Code (28 U.S.C. 377), which is the general statute permitting the Federal Courts to issue writs necessary for the exercise of their

respective jurisdictions. No reference is made to section 284 of the Judicial Code, quoted above, under which the pleas attack the jurisdiction of the grand jury and of the trial court. Neither is any reference made to the constitutional and statutory provisions safeguarding the right of respondents to a trial by jury on the issues raised by the pleas and the Government's traverse of them.

On the above basis, petitioners frame an issue foreign to the real issue. They say the question is whether a writ of mandamus may issue to correct an erroneous ruling of a District Court on the sufficiency of a plea in abatement (Petition, p. 2).

This is not the question at all. The question is whether the Circuit Court of Appeals had *jurisdiction*—power—to issue this writ of mandamus in the particular circumstances of the present case. Petitioners do not contend that the circumstances are not such as properly to have moved the court *in its discretion* to have issued the writ if power to issue it exists. The sole question presented by the petition is, therefore, whether in *any* circumstances the Circuit Court of Appeals has power to issue a writ of mandamus in respect of *any* ruling by a District Court which might ultimately be reviewed on appeal.

The position taken by petitioners has been rejected repeatedly by this Court. The Circuit Court of Appeals has express statutory authority, like that of this Court, to issue writs of mandamus under proper circumstances (Judicial Code, section 262; 28 U.S.C. 377).[2] Among the

[2] "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

circumstances which have been held sufficient to justify the exercise of the power to issue a writ of mandamus are the following—*all* of which are present in this case:

(a) That the action of the trial court has denied petitioners the right to trial by jury.

Ex parte Simons (1918) 247 U. S. 231;

Ex Parte Peterson (1920) 253 U.S. 300;

Ex parte Skinner & Eddy Corp. (1924) 265 U.S. 86.

(b) That the matters presented involve the jurisdiction of the trial court.

Virginia v. Rives (1879) 100 U.S. 313, 323;

Ex parte Bransford (1940) 310 U.S. 354, 355;

Ex parte Northern Pac. R. Co. (1929) 280 U.S. 142;

Stratton v. St. Louis S.W. Ry. (1930) 282 U.S. 10, 16.[3]

---

[3]That the present pleas go to the jurisdiction is, we submit, clear beyond argument. The pleas show that by express statute, namely, section 284 of the Judicial Code, quoted above, the grand jury had no jurisdiction to return an indictment at the March term, and that the court had no jurisdiction to try defendants under such an indictment (R. 41, 46).

In *Ex parte Bain* (1887) 121 U.S. 1, the petitioner sued out a writ of habeas corpus, alleging that he had been tried on an indictment amended on motion of the Government after its return by the grand jury. This Court held that since the indictment was "no indictment of a grand jury" the court had no jurisdiction to try or convict the petitioner, saying (121 U.S. 13-14):

> "It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, **the jurisdiction of the offence is gone,** and the court has no right to proceed any further in the progress of the case for want of an indictment."

Directly in accord is *Albrecht v. United States* (1927) 273 U.S. 1, 8, where this Court, citing *Ex parte Bain*, held that

> "A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court,"

and that a court "may acquire jurisdiction over the person of the defendant" only "when there was an appropriate accusation either by indictment or information, • • •."

(c) That no appeal lies from the challenged order and if the parties are remitted to relief on appeal from a final judgment they and the courts will be subjected to the burden of a long and expensive trial which ultimately must be held to have been required under a mistake.

Ex parte Simons (1918) 247 U.S. 231;
Ex parte Peterson (1920) 253 U.S. 300;
Ex parte Skinner & Eddy Corp. (1924) 265 U.S. 86.

In *Ex parte Simons* (1918) 247 U.S. 231, supra, the trial court had erroneously transferred a cause to the equity side of the docket. Plaintiff applied to this Court for a writ of mandamus to compel the trial judge to vacate his order and to grant a jury trial. In opposing this petition respondent presented the identical argument here advanced by petitioners[1] (247 U.S. 236):

"So far as petitioner's right at law is concerned, her constitutional right to trial by jury is no more and no less involved than is the right of any other plaintiff to whose declaration at law a general demurrer has been sustained. If the demurrer was improperly sustained, the petitioner will, after reversal and remandment, obtain her jury trial."

This Court, however, directed the issuance of the writ, saying (247 U.S. 239):

"If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance

[1] "But the order sustaining the motion to strike, like an order sustaining a demurrer, was not a refusal to try, but a final adjudication, after argument, that the pleading was insufficient in law" (Petition, p. 7).

that ultimately must be held to have been required under a mistake."

In *Ex parte Peterson* (1920) 253 U.S. 300, the trial court appointed an auditor in an action at law. Application for a writ of mandamus was made to this Court, petitioner contending that the order appointing the auditor would result in a violation of his constitutional right to a jury trial. Overruling objections to its jurisdiction to issue the writ, this Court said (253 U.S. 305-306):

> "Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in *Ex parte Simons*, 247 U.S. 231, 239, 'be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held to have been required under a mistake.' The objection to our jurisdiction is unfounded. We proceed, therefore, to the consideration of the merits of the petition."

In *Ex parte Skinner & Eddy Corp.* (1924) 265 U.S. 86, this Court, in issuing a writ of mandamus to the Court of Claims to compel that Court to permit plaintiff to dismiss the suit, said (265 U.S. pp. 95-96):

> "It only remains to inquire whether this is a proper case for the writ asked. Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. Although classed as a legal remedy, in issuing it a court must be largely controlled by equitable principles. *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 312; *Arant v. Lane*, 249 U.S. 367, 371. It would be a useless waste of time and effort to enforce a trial in the Court of Claims if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated. Added to this is the consideration which has been regarded as furnishing a substantial ground for the extraordinary process of the writ that the petitioner by a denial of his right to dismiss in the Court of Claims will be deprived of a right of trial by jury in the state court of Washington. *Ex parte Peterson*, 253 U.S. 300, 305; *Ex parte Simons*, 247 U.S. 231, 239."

Since the filing of the petition herein, this Court decided the case of *Adams v. United States, ex rel. McCann* (No. 79, this term, decided December 21, 1942). It repudiates the position taken by petitioners, who refer to the argument in the Government's brief in that case as supporting their position here (Petition, p. 9). The *Adams* case involved the jurisdiction of the Circuit Court of Appeals to issue a writ of habeas corpus on behalf of a defendant who had waived a jury without advice of counsel. While upholding the defendant's waiver, this Court held that the Circuit Court of Appeals acted within its jurisdiction in issuing the writ. Reaffirming the principles laid down in the decisions cited above, this Court said:

"Procedural instruments are means for achieving the rational ends of law. A circuit court of appeals is not limited to issuing a writ of *habeas corpus* only when it finds that it is 'necessary' in the sense that the court could not otherwise physically discharge its appellate duties. Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, **when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.** Undoubtedly therefore, the Circuit Court of Appeals had 'jurisdiction', in the sense that it had the power, to issue the writ as an incident to the appeal then pending before it. The real question is whether the Circuit Court of Appeals abused its power in exercising that jurisdiction in the situation that confronted it.

Of course the writ of *habeas corpus* should not do service for an appeal. *Glasgow v. Moyer*, 225 U.S. 420, 428; *Matter of Gregory*, 219 U.S. 210, 213. This rule must be strictly observed if orderly appellate procedure is to be maintained. Mere convenience cannot justify use of the writ as a substitute for an appeal. But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts. In exceptional cases where, because of special circumstances, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice, the writ of *habeas corpus* is available to a circuit court of appeals."

The *Adams* case, and the other decisions by this Court above referred to, leave no foundation for the contention advanced in the present petition that the Circuit Court of Appeals had no *power* to issue the writ of mandamus.

Beyond this, the decision of the Circuit Court of Appeals is in accord with the practical and realistic application of procedural rules called for in the *Adams* case. The record in this case shows—in addition to the considerations above mentioned—that the defendants, corporate and individual, represent a good sized segment of the evaporated milk industry (R. 71). When the indictment was returned in June, 1941, that industry had already been called upon for great increases in production for purposes of lend-lease abroad and preparedness at home; this under the same priorities as were being accorded to shells (R. 71-72). Naturally the burden has greatly increased with our entry into the war, and as this reply is written the papers say that domestic rationing of evaporated milk is at hand. The record shows that many of the forty-four defendants are engaged, not only in their own businesses of production, but also with the War Production Board and other war agencies (R. 72).

If the indictment is invalid this case should end "now" (*Ex parte Simons*, supra)—not after forty-four defendants have been brought from all corners of the country, diverted from production work, and held for a trial of weeks or months in San Francisco. All this will be perfectly futile if the position taken by the present pleas is ultimately sustained. The factual issues determining the validity of the grand jury action, its jurisdiction and that of the trial court, can be determined in a trial of a few hours.

In conclusion we repeat that petitioners do not contend that the record before the Circuit Court of Appeals was insufficient to justify the issuance of a writ of mandamus if the power to issue the writ existed. That the court had

power to issue the writ is, we submit, established by the principles of law and the precepts of common sense declared in *Adams v. United States, ex rel. McCann*, supra, and the other decisions of this Court above cited.

We respectfully submit that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
January 23, 1942.

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CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 584

HONORABLE MICHAEL J. ROCHE, United States District Judge for the Northern District of California, Southern Division, et al.,

vs.

EVAPORATED MILK ASSOCIATION, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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In the Supreme Court
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EVAPORATED MILK ASSOCIATION, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 130) is reported in 130 F. (2d) 843.

JURISDICTION.

The judgment of the Circuit Court of Appeals on rehearing was entered September 12, 1942 (R. 129, 148).

Petition for certiorari was filed December 12, 1942, and was granted February 8, 1943 (R. 152). The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

Section 262 of the Judicial Code (28 U. S. C. 377) provides in part:

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Section 284 of the Judicial Code (28 U. S. C. 421) provides in part:

> "A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months; *Provided*, That, for good cause shown, the court may, at any time after the end of the term for which the grand jury was originally summoned, excuse any member of the grand jury and summon and impanel another person in his place."

Section 566 of the Revised Statutes (28 U. S. C. 770) provides in part:

> "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admir-

alty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury."

Section 1011 of the Revised Statutes (28 U. S. C. 879) provides:

"There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

The Act of May 9, 1942 (18 U. S. C. 682) provides in part:

"An appeal may be taken by and on behalf of the United States from the district courts to a circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

STATEMENT OF THE CASE

The statement of the case in the Government's brief omits most of the pertinent facts as to the pleas based upon section 284 of the Judicial Code, and all of the facts as to the pleas based upon the court's order under that statute. These omitted facts are in our opinion determinative of the case. Accordingly we desire to restate the case.

A. Preliminary statement.

Respondents are twenty-two corporations, one association, and twenty individuals engaged in the manufacture and sale of evaporated milk or activities alleged to be connected therewith (R. 13-16). They are under indictment (R. 12), returned June 3, 1941 (R. 21), for alleged violations of the Sherman Act.

All respondents filed pleas raising the point that the grand jury had no jurisdiction to return the indictment and that the court has no jurisdiction to try the case (R. 34, 43). While there are several pleas they set up in essence (1) that the investigation culminating in the indictment was not begun during the November 1940 Term, and (2) that no investigation was begun on or before February 26, 1941. If these facts are true the grand jury—(1) by express statutory provision, and (2) by reason of the terms of the court's order continuing its existence under that statute from the November 1940 Term to the March 1941 Term, at which the indictment was returned—had no jurisdiction to return the indictment and the court, therefore, has no jurisdiction to try the case (infra, this brief).

The Government filed replications traversing these pleas (R. 8, 51-52). The court set them down for trial before a jury (R. 9, 49-50). Nearly three months later and on the eve of trial the Government moved for leave to withdraw its replications and to strike the pleas (R. 9, 52-53). The trial court granted the Government's motions (R. 69-70). Respondents moved the court to vacate its order striking the pleas, to reinstate the pleas and replications, and to

reset the pleas for jury trial (R. 9, 70). This motion was denied (R. 9, 70).

Thereupon respondents applied to the Circuit Court of Appeals for a writ of mandamus or other appropriate writ (R. 1, 2). After hearing on return to an order to show cause (R. 55), the court issued the writ as prayed, all judges concurring (R. 124). After rehearing before the seven circuit judges sitting in bank (R. 128) the court again ordered the writ to issue (R. 129, 148; opinion, R. 130). Two judges dissented (Denman and Healy, JJ., R. 130); one did not participate (Stephens, J., R. 129).

B. The facts.

On June 3, 1941, there was returned and filed in the District Court an "indictment" (R. 3, 12) purporting to charge respondents with violations of sections 1 and 3 of the Sherman Antitrust Act (15 U.S.C. 1, 3). The grand jury which returned this indictment was impaneled at the November 1940 Term (R. 3). This term expired at midnight, March 2, 1941 (R. 4). The indictment was returned at the end of the succeeding March 1941 Term (R. 3, 21). The grand jury, therefore, had no jurisdiction to return the indictment in the March 1941 Term, except as authorized by section 284 of the Judicial Code (28 U.S.C. 421), which provides:

> "A district judge may, upon request of the district attorney or of the grand jury or on his own motion, **by order** authorize any grand jury to continue to sit during the term succeeding the term at which such request was made, **solely to finish investigations begun but not finished by such grand jury,** * * *."

Purporting to act under this statute, counsel for the United States executed on February 25, 1941, and filed with the District Court on February 26, 1941 (R. 22-23) a petition which alleged that certain investigations had then been begun but not finished, and which prayed, on that ground, for an order of the court continuing the grand jury in session during the March 1941 Term "solely to finish said investigations." This petition (R. 4, 47) is set out in the footnote.[1]

On February 28, 1941, the court issued its order granting this petition and authorizing the November 1940 Term Grand Jury to continue to sit during the March 1941 Term for the sole purpose of finishing said investigations re-

---

[1] "PETITION

Now come Frank J. Hennessy, United States Attorney for the Northern District of California, Tom C. Clark and Charles C. Pearce, Special Assistants to the Attorney General, and represent that certain investigations have been begun by the November 1940 Term Grand Jury for the Northern District of California, Southern Division, which have not been finished and can not be finished within said term.

It is therefore respectfully requested that an order be entered by this Court authorizing the said November 1940 Term Grand Jury to continue to sit during the term succeeding the said November 1940 Term, to-wit: the March 1941 Term, solely to finish said investigations begun but not finished by the said November 1940 Term Grand Jury.

Frank J. Hennessy
United States Attorney.
for the Northern District of California
Tom C. Clark
Charles C. Pearce
Special Assistants to the Attorney General.

Dated at San Francisco, California, This 25 day of February, 1941."

ferred to in the petition. This order (R. 4, 48) is set out in the footnote.[2]

On July 2, 1941, shortly after the return of the indictment, respondents filed a motion for an order requiring the Government (1) to disclose the day on which the grand jury commenced its investigation of the matters which culminated in this indictment, and (2) to disclose the attendance record of the grand jury (R. 5, 84-85). This motion was granted (R. 86).

On August 6, 1941, in compliance with the part of this order directing disclosure of the commencement date of the investigation, it was stated in open court that the investigation was begun "shortly after November 6th—in any event during the November term" (R. 5, 30-31).

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[2] "IN RE: NOVEMBER TERM, A. D. 1940 GRAND JURY
ORDER

This matter coming on to be heard upon the petition of Frank J. Hennessy, United States Attorney for the Northern District of California; Tom C. Clark and Charles C. Pearce, Special Assistants to the Attorney General, for an order authorizing the November 1940 Term Grand Jury for the Northern District of California, Southern Division, to continue to sit during the March 1941 Term for the sole purpose of finishing certain investigations undertaken during the November 1940 Term which have not been and cannot be finished by said Grand Jury within said November 1940 Term, and it appearing to the Court that said investigations begun by said Grand Jury within said November 1940 Term have not and cannot be finished within said Term;

IT IS THEREFORE ORDERED that the November 1940 Term Grand Jury now sitting in this Division and District, be and it is hereby authorized to continue to sit during the March 1941 Term of this Court for the sole purpose of finishing said investigations begun but not finished by it during the November 1940 Term of this Court.

A. F. St. Sure
United States District Judge

Dated at San Francisco, California, this 28th day of February 1941."

The date of the commencement of the investigation had a double significance:

(1) Unless the investigation was begun during the November 1940 Term, the grand jury had no jurisdiction, under the statute, to return this indictment in the succeeding term; and unless it was begun prior to February 26th, the grand jury had no jurisdiction under the court's order.

(2) The personnel of the grand jury was changed by adding five new members at the start of the new term (R. 27-28). If, as believed by defense counsel from the statements of government counsel (R. 5, 30-31), the investigation started in the November 1940 Term and was continued in the March 1941 Term, then the personnel of this judicial body (the grand jury) had been changed in the middle of the case. In this latter connection it also appeared from the disclosure of the grand jury attendance record (following R. 54), that **only five** members of the grand jury were present at all sessions during the two terms; that there were less than twelve of the grand jurors (i. e. less than the statutory number to indict) who were not absent from substantial numbers of sessions, such absences running in some cases to more than forty per cent of the sessions.

On the above facts, defense counsel moved to quash the indictment on the grounds (1) that the personnel of a grand jury, a judicial body, cannot be changed in the middle of a proceeding, and (2) that a grand juror with substantial absences from sessions is disqualified to vote,

and that here there were less than the statutory number required to indict who were not so disqualified (R. 87).[3]

In opposition to this motion, and to destroy the significance of the absences of grand jurors during the November Term and the substitution of the new jurors at the beginning of the March Term, the government attorneys in a brief filed on August 20, 1941, **for the first time** stated that the grand jury during the November 1940 Term considered only "routine matters," and

> "the matters relating to the indictment now under attack were not considered until February 28, 1941" (R. 6).

February 28, 1941, was three days after the Government's petition to continue the grand jury was executed and two days after it was filed, and hence three days, or at the

[3]Respondents relied in part on these motions on the position taken by the Antitrust Division itself with regard to absences of grand jurors. Quoting from *The Sherman Antitrust Act and Its Enforcement*, by Assistant Attorney General Arnold and Staff Members of the Antitrust Division, U. S. Department of Justice (Vol. VII, p. 120, *Law and Contemporary Problems*, Duke University, 1940):

> "The number of the grand jurors is twenty-three, a quorum is sixteen, and the vote of twelve qualified jurors is necessary in order to return a true bill. If sixteen jurors are present they are sufficient to continue with the proceeding. Of course, it is much more advisable to have all jurors present, and as a practical matter counsel and the foreman should join in trying to enforce a rule that limits very materially the right of jurors to be absent. This is important to avoid such a situation as an indictment for which only twelve qualified jurors voted, one of whom has been absent from the grand jury room for an appreciable amount of time. **If those facts were ever to come to light,** the contention could be made with plausibility that the juror who was absent most of the time really did not exercise his own discretion on the evidence in casting his vote. Hence, the wisest course is to have just as many of the twenty-three jurors present as possible."

latest two days, after the date for beginning investigations under the order of the court continuing the grand jury in session. It was also **the last day** on which the grand jury sat at the November 1940 Term (R. 6).

On August 22, 1941, government counsel made further disclosures in order to defeat respondents' pending motions.[4] The record is as follows:

> "Mr. Burdell. In this case, your Honor, might I say one or two words before the actual argument on the motions commences? At the time that the Government was required to comply with the motion for disclosure, one of the demands that the Government was compelled to comply with was a demand for the date of the commencement of the investigation which resulted in the return of the indictment. The Government was required to make that disclosure in open court without access to records, and the best it was able to do was to state that the investigation began during the November, 1940 term. At that time it was thought that the disclosure was sufficient and satisfactory. However, as a result of subsequent motions that have been filed it appears that the actual date of the commencement of the investigation is very material. I would like, therefore, permission to comply more completely with the demand in the motion for disclosure, **and now state for the record the exact date of the commencement of the investigation.**
>
> . . . . . .
>
> The Court. Were you the one that presented it?
> Mr. Burdell. Yes.
> The Court. Was there anyone presented any testimony to the grand jury in this case before you did, do you know?

[4] These motions were denied after the hearing.

Mr. Burdell. I was present at every grand jury session, your Honor, when matters relating to this indictment were presented.

The Court. What was the first date that any testimony was taken before the grand jury, if you know?

Mr. Burdell. February 28, 1941" (R. 31, 33).

This categorical statement, if correct, lessened the significance of the change in the grand jury personnel and of the absences of the grand jurors, because February 28 was the last session of the March 1941 Term (R. 4, 26). However, if February 28 was "the exact date of the commencement of the investigation" (Burdell, supra), it was immediately apparent that the grand jury had no jurisdiction to return the indictment because an investigation commenced on that date was **outside the scope of the court's order continuing the life of the grand jury into the next term** (see order quoted supra, p. 7). And the further question was immediately suggested—since the single morning session of February 28th was the last session of the November Term—whether at any time during the November Term an investigation of this particular case was actually begun, so as to authorize the grand jury—continued "solely to finish investigations begun"—to return the indictment in this case.

Following the statements above quoted, at which February 28th was formally given as the commencement date, the court took a recess (R. 33). When court reconvened another date was stated, namely, February 27th (R. 33). In support of this third date government counsel **read** into the record (defense counsel were never permitted to **see** the minutes of the grand jury) the following, which were

said to be the minutes of the grand jury dated February 28, 1941:

"Mr. Burdell. I will now read in the minutes of the grand jury dated February 28, 1941:

'Special meeting of the Federal Grand Jury held this day, Foreman Mrs. Hattie H. Sloss, presiding. Minutes of previous meeting read and approved as corrected. (see below) Special Assistant to the Attorney General Charles C. Pearce and Special Assistant Charles S. Burdell continued the presentation of the investigation of the peach industry for violation of the Sherman Anti-Trust Act. There being no further business the meeting adjourned.' Signed, I think it is, 'C. N. Alexander, Secretary,' and 'Approved Eva L. Gibson, Foreman, pro tem.'

Then below the following appears:

'The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigatron of Sugar Beet Industry was begun. Other industries named as subject to investigation are Salmon Industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland. Asparagus and Charries.'" (R. 33-34.)

The text of the minutes of February 27th was not disclosed (R. 34), nor was any further light shed upon the happenings of that day, although the attorney for the

Government who had previously said that he was present at every session of the grand jury touching this case was in court with the minutes in his hand.

On the basis of either date stated by government counsel as the date of commencement of the investigation (February 27th or 28th), it appeared that the indictment was outside the scope of the court's order continuing the grand jury in session.

But in addition, when the minutes of the grand jury were read to support counsel's last statement of February 27th as the date of beginning, it appeared for the first time that the investigation of the particular matters and defendants involved **in this indictment** was not begun at all during the November 1940 Term. The minutes simply state that **sixteen** nationwide industries, comprising in the aggregate virtually the entire food industry of the country, were "named" by witnesses. As to a whole group of these (eight in all) they state generally "and investigation begun." But with respect to **this particular indictment** counsel already had categorically stated that no testimony was taken prior to February 28th.

> "The Court. What was the first date that any testimony was taken before the grand jury, if you know?
>
> Mr. Burdell. February 28, 1941" (R. 33).

This is contrary to the minutes of the 28th which show that no testimony was taken or investigation made on that day of any matters alleged in this indictment. Government counsel stated that the passage above quoted was the whole record of that day (R. 34). On the preced-

ing day, February 27th, the grand jury was investigating the "peach industry," for the minutes of the 28th recite that on that day government counsel "**continued** the presentation of the investigation of the peach industry." On the same day, it is said, sixteen nationwide industries were "named" by witnesses. No defendant in this indictment, no offense charged in this indictment, is "named." The entry contains the words "and investigation begun," with nothing to answe. the many questions which at once suggest themselves. Investigation of what? Of all the industries? Or only some? Of all the persons and companies in each industry? If not, which? Did the grand jury complete investigation of three national industries in one day and begin on the milk industry the same day?

The minutes of February 28th and the correction of those of the 27th also reveal that they were written at some later time. They are "Approved Eva L. Gibson, Foreman, pro tem" (R. 7). Mrs. Sloss was the Foreman of this grand jury and was present at the February 27th, February 28th, March 4th and March 5th sessions of the grand jury (R. 7, 28). Mrs. Gibson was not appointed Foreman pro tem until March 5, which was in the new term (R. 28-29).

Promptly after the above disclosures, respondents filed the pleas under consideration, challenging the jurisdiction of the grand jury to return the indictment and the jurisdiction of the court to try respondents thereon.

One set of pleas was filed by the Carnation Company, and a similar set of pleas was filed on behalf of all other

respondents (R. 34, 43).[5] Each set of pleas raised the points (1) that no investigation was begun at the November Term, this being directed to the statutory requirement already referred to, and (2) that no investigation was begun on or before February 26, 1941, this being directed to the scope of the court's order.

On September 22, 1941, the Government filed replications to these pleas (R. 8, 51-52). These replications were general denials, joining issues of fact. Thereupon respondents demanded a jury trial. The right to such a trial was conceded by the Government (R. 9) and the court set the pleas down for trial by jury on December 3, 1941 (R. 9).

Shortly prior to December 3, the jury trial of the pleas was continued at the Government's request to December 15, 1941 (R. 9). On December 9, 1941, the Government, without showing any cause why it should be permitted to change its pleadings, filed a motion for leave to withdraw its replications and to strike the pleas (R. 9, 52-55).

On January 28, 1942, the District Court granted these motions and struck the pleas (R. 9). Respondents thereupon moved the court to vacate its order striking the pleas, to reinstate the pleas and replications, and to reset the pleas for jury trial (R. 9). This motion was denied (R. 9).

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[5]The first three pleas of the Carnation Company (R. 34-39) were demurred to in the court below, and the demurrers sustained. They are not involved in this proceeding. The fourth and fifth (R. 39-41) are the pleas raising the issues here involved and which were stricken by the District Court.

The petition for a writ of mandamus followed, and was granted by the Circuit Court of Appeals as already discussed (supra, p. 5).

SUMMARY OF ARGUMENT.

The Circuit Court of Appeals had power to issue the writ of mandamus under section 262 of the Judicial Code. This power is not affected by section 1011 of the Revised Statutes. The only question is whether, under the special circumstances of this case, the court should have exercised its power to issue the writ. Among the "special circumstances" which have been held sufficient to require the issuance of a writ of mandamus, are the following:

That the action of the trial court has denied petitioners the right to trial by jury;

That the questions presented involve matters of public importance in the administration of justice;

That the matters presented involve the jurisdiction of the trial court;

That no appeal lies from the challenged order and if the parties are remitted to relief on appeal from a final judgment they and the courts will be subjected to the burden of a long and expensive trial which ultimately must be held to have been required under a mistake. This circumstance has particular force at this time because of the important war work being performed by respondents.

All of these circumstances are present in this case and warranted the issuance of the writ.

The writ of mandate was not improper on the ground that the District Court ruled correctly in striking out the pleas. The two points made by the Government in this regard are unsound. The pleas state facts showing that the investigation of the matters in this indictment was not begun at the November 1940 Term, and therefore that the indictment returned at the succeeding March Term was in violation of the statute (Judicial Code, sec. 284, 28 U.S.C. 421, supra). The pleas show that this case was outside the scope of the order of the District Court continuing the life of the grand jury into the March Term. The facts so stated constitute a defense.

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS HAD JURISDICTION TO ISSUE MANDAMUS.

A. The Circuit Court of Appeals had "jurisdiction," in the sense that it had the power, to issue mandamus and correctly did so if the exceptional circumstances of this case warranted the exercise of its discretion in that regard.

The Government contends that the circuit courts of appeals have no power to issue a writ of mandamus (1) if the writ is used to correct an erroneous ruling of the trial court in a case over which it has jurisdiction, (2) if there is an ultimate remedy by appeal, or (3) if the writ is not issued in aid of an appeal already pending (Brief for Petitioners, p. 10).

These contentions long since have been foreclosed by the decisions of this Court.

Section 262 of the Judicial Code provides:

> "The supreme court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In *Ex Parte United States* (1932) 287 U.S. 241, this Court, construing this statute and stating the rule as to jurisdiction, held that while the granting of mandamus in any case rests in the discretion of the court, the ultimate plenary power to issue the writ exists where the case in which it operates is one within the appellate jurisdiction of the court—"the issue of the writ may rest upon the ultimate power which we have to review the case itself" (287 U.S., 246). In so ruling the Court stated and applied principles long established by this Court.

In *Ex parte Simons* (1918) 247 U.S. 231, the trial court had erroneously transferred a cause to the equity side of the docket. Plaintiff applied to this Court for a writ of mandamus to compel the trial judge to vacate his order and to grant a jury trial. In opposing this petition respondent presented the identical argument here advanced by petitioners (247 U.S., 236):

> "So far as petitioner's right at law is concerned, her constitutional right to trial by jury is no more and no less involved than is the right of any other plaintiff to whose declaration at law a general demurrer has been sustained. If the demurrer was improperly sustained, the petitioner will, after reversal and remandment, obtain her jury trial."

This Court, however, rejected this contention and directed the issuance of the writ, saying (247 U.S., 239):

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake."

In *Ex parte Peterson* (1920) 253 U.S. 300, the trial court appointed an auditor in an action at law. Application for a writ of mandamus was made to this Court, petitioner contending that the order appointing the auditor would result in a violation of his constitutional right to a jury trial. Overruling objections to its jurisdiction to issue the writ, this Court said (253 U.S., 305-306):

> "Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in *Ex parte Simons*, 247 U.S. 231, 239, 'be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held to have been required under a mistake.' The objection

to our jurisdiction is unfounded. We proceed, therefore, to the consideration of the merits of the petition."

In *Ex parte Skinner & Eddy Corp.* (1924) 265 U.S. 86, this court, in issuing a writ of mandamus to the Court of Claims to compel that court to afford plaintiff the right to dismiss the suit, said (265 U.S., 95-96):

> "It only remains to inquire whether this is a proper case for the writ asked. Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. Although classed as a legal remedy, in issuing it a court must be largely controlled by equitable principles. *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 312; *Arant v. Lane*, 249 U.S. 367, 371. It would be a useless waste of time and effort to enforce a trial in the Court of Claims if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated. Added to this is the consideration which has been regarded as furnishing a substantial ground for the extraordinary process of the writ that the petitioner by a denial of his right to dismiss in the Court of Claims will be deprived of a right of trial by jury in the state court of Washington. *Ex parte Peterson*, 253 U.S. 300, 305; *Ex parte Simons*, 247 U.S. 231, 239."

In *McClellan v. Carland* (1910) 217 U.S. 268, the trial court had erroneously granted a continuance of the trial until after the determination of proceedings in a state court. This Court held that the Circuit Court of Appeals should have issued mandamus to set aside this ruling and to direct the trial to proceed. Answering objections to

the jurisdiction of the Circuit Court of Appeals, this Court said (p. 280):

> "There are not wanting decisions in the Federal courts holding different views as to the right to issue such writs as are involved in this case, before the appellate court has actually obtained jurisdiction of the case. There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."

And in *Los Angeles Brush Corp. v. James* (1927) 272 U.S. 701, where this Court directed its writ to the district court to correct an erroneous order referring a patent case to a master for trial, the Court said (pp. 705-706):

> "The hearing of these causes in review would normally be had in the Circuit Court of Appeals of the Ninth Circuit, and they could only come here in due course by applications for certiorari and the granting of them. We do not need to decide whether the intervention between this Court and the District Court of an intermediate appellate court would prevent the issue of mandamus by this Court, direct to the District Court, in matters in which the Circuit Court of Appeals would or should ordinarily have power to issue a mandamus to the same end in aid of its appellate jurisdiction. * * * The question of thus using the writ of mandamus would be a matter of discretion in this Court, and it would decline to exercise its power where the issue might more properly come up by mandamus in an intermediate appellate court or in regular proceedings on review."

An identical decision is *McCullough v. Cosgrave* (1940) 309 U.S. 634.

See also,

D. L. & W. R. R. v. Rellstab (1928) 276 U.S. 1, 5.

In each of these cases, and in many others that might be cited, no appeal was pending at the time the writ issued; the erroneous order complained of and corrected by mandamus was one made by the court acting within its jurisdiction; and the order could ultimately have been reviewed on appeal. Nevertheless in each case this Court affirmed its power or that of the Circuit Court of Appeals to issue the writ, pointing out that in all such cases the question whether the writ should issue is one resting within the discretion of the court.

The Government suggests a distinction of the above cases on the ground that there may be a difference in the power of this Court and that of the Circuit Court of Appeals (Brief for Petitioners, p. 27, et seq.; and see pp. 34-35). No such distinction is permissible under section 262 of the Judicial Code which applies alike to both courts. Beyond this, such a distinction is directly contrary to the principle established in *Los Angeles Brush Corp. v. James* (1927) 272 U.S. 701, and *Ex parte United States* (1932) 287 U.S. 241; that an application for mandamus ordinarily should be made to the Circuit Court of Appeals, rather than to this Court—a principle many times applied. See,

Ex parte Apex Electric Manufacturing Co. (1927) 274 U.S. 725;

Ex parte Daugherty (1931) 282 U.S. 809;

Ex parte Krentler-Arnold Hinge Last Co. (1932) 286 U.S. 533;

Ex parte Western Loan & Securities Co. (1933) 290 U.S. 601;

Ex parte Miller (1934) 290 U.S. 605;

Ex parte Grubbs (1934) 293 U.S. 521;

Ex parte Northern Insurance Co. of New York (1935) 296 U.S. 547;

Ex parte Steelman (1937) 301 U.S. 665.

The ruling of the court below is also in accord with many decisions of the circuit courts of appeals. In *Whittel v. Roche* (9th C.C.A., 1937) 88 F. (2d) 366, 371, the court after a review of the cases pointed out that under the rule now established

> "* * * the writ is not necessarily confined to controlling the action of the lower court so that the question involved shall ultimately reach the Circuit Court of Appeals on appeal, and then be determined, but may be issued where the purpose of the writ is to give effective control over matters pending in the District Court where the right of appeal may be entirely ineffective to correct the erroneous ruling of the trial court.

> * * * * * * *

> The question [in each case] is whether or not there are such special circumstances as would authorize or require this court to exercise by mandamus its supervisory power over the trial court."[6]

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[6]In the court below the Government conceded that under the doctrine of this case the Circuit Court of Appeals had plenary power to issue the writ:

"Judge Wilbur. It has been suggested here that you do not question the power of the Court to issue a writ of mandamus.

Mr. Howland. I was about to say, your Honor, under the doctrine of Whittel v. Roche, we have no desire to question the ultimate plenary power of this Court to issue the writ.

Judge Wilbur. As far as I know, that case has not been reversed yet.

Mr. Howland. I think not. The only question we would raise under the doctrine of that case, is whether such special

A like conclusion is reached, after a review of the authorities, in *Minnesota & Ontario Paper Co. v. Molyneaux* (8th C.C.A., 1934) 70 F. (2d) 545, 546-547:

> "One of the limitations of this section is to such writs of this character as 'may be necessary for the exercise of their respective jurisdictions.' The jurisdiction of the Court of Appeals is purely appellate. • • • Therefore Courts of Appeals can entertain such writs only where they are 'necessary for the exercise of' appellate jurisdiction. Whether such appellate jurisdiction exists is determined, not alone by the pendency of an appeal, but by whether the proceeding in the lower court to be affected by the writ is 'within the appellate jurisdiction of the higher court.' • • • Where such appellate jurisdiction exists, the necessary original writs may be entertained for any purpose necessary to protect the full exercise of that jurisdiction. One situation classed within such protection of appellate jurisdiction is where the right of appeal exists but because of the presence of 'circumstances imperatively demanding' a departure from the ordinary remedy by • • • appeal' • • • is necessary. In such situation, the writs may be employed 'as an auxiliary process, and • • • as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways.' • • •
>
> It has been repeatedly declared by the Supreme Court that various original writs 'cannot' be used as a substitute for appeal or writ of error. While this language ('cannot') was suited to the cases wherein used, it is evidently too broad for universal application because other decisions expressly recognize that

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circumstances exist in this case which would warrant the court in issuing the writ" (Transcript of Oral Argument in the Circuit Court of Appeals, pp. 23-24).

there are situations where the appropriate writ may be employed even though the remedy of writ of error or appeal exists. * * * From this situation it is clear that the appellate court has *jurisdiction* in every application for a writ—even where there is a remedy by writ of error or appeal—to determine whether the case is 'rare and exceptional' or * * * the record discloses 'any special circumstances' which justify 'a departure from the regular course of judicial procedure.' If such 'special circumstances' are found to exist, the court *may* issue the writ. If such are found not to exist, the court will refuse the writ for that reason. We construe this condition of the law as follows: The *jurisdiction* exists, but the granting of the writ is within the discretion of the court (Ex parte United States, 287 U.S. 241, 248, 53 S. Ct. 129, 77 L. Ed. 283), and an established rule of law limiting the exercise of that discretion is that the writ will not issue where the remedy of appeal exists (or existed), unless the record discloses such 'special circumstances' as to make it a 'rare and exceptional' case."

In *Barber Asphalt Pav. Co. v. Morris* (8th C.C.A., 1904) 132 Fed. 945, 956 (cited with approval by this Court in *McClellan v. Carland* (1910) 217 U.S. 268, 280) the court said:

"Finally, it is insisted that the writ of mandamus should not issue in this case because that writ may not be used to compel a subordinate court to reverse or revise its decision of a question properly submitted for its consideration in the progress of a case before it, or to direct it how to decide or by what rules to proceed. * * * It is undoubtedly the general rule that a court has no power by writ of mandamus to compel a subordinate judicial officer to reverse a conclusion already reached, to correct an erroneous decision, or to direct him in what particular way he shall proceed

or shall decide a specified question. But it is equally a part of this general rule that the court always has the power by means of such a writ to compel such an officer to proceed to try and decide a controversy within his jurisdiction, or to perform any other plain duty imposed by law. * * * The power to compel such an officer to proceed to the trial and determination of a case which it is his duty to hear and decide necessarily includes within it the power to compel him to reverse and set aside any erroneous decision he may have made to the effect that he will not proceed to such a trial and judgment."

In *Ex Parte Edelstein* (2d C.C.A., 1929) 30 F. (2d) 636, plaintiff applied to the Circuit Court of Appeals for mandamus after the trial court had dismissed the bill of complaint for lack of jurisdiction as to certain of the defendants. Sustaining its jurisdiction to issue the writ the court, speaking through Judge Learned Hand, said (p. 637):

"Both sides agree that the plaintiff cannot appeal from the decree dismissing the bill in part, and, as he has not discontinued the suit against Gillmore, Mitchell, and Dulzell, the first question is whether we have jurisdiction to issue a writ of mandamus. It is abundantly settled that we have, when it is necessary to protect our appellate jurisdiction, whether or not the cause be already before us on appeal * * *; but in the case at bar the District Court has already acted, and its decision will in season come before us for review, so that it might well be argued that the only service of the writ would be to expedite an appeal. Moreover, mandamus will not usually go when there is another remedy. On the other hand, the court has refused to entertain the case at all, and its

action does prevent our consideration of the merits which will not be before us on appeal from the decree. At any rate the Supreme Court in Re Hohorst, 150 U.S. 653, 14 S.Ct. 221, 37 L. Ed. 1211, took the second view under precisely similar circumstances to those at bar, and the decision, though several times cited, has never been questioned. While the power depended upon section 342 of title 28 of the Code (28 USCA § 342), it was ancillary to the appellate jurisdiction of the court (Insurance Co. v. Comstock, 16 Wall. 258, 21 L. Ed. 493); and, although our own power must rest upon section 377, we do not doubt that, if our appellate jurisdiction be involved, that section covers instances in which the Supreme Court would protect its own jurisdiction under section 342. We think, therefore, that we must decide the question presented to the District Court."

To the same effect are:

In re Lisman (2d C.C.A., 1937) 89 F. (2d) 898;

In re Babcock (7th C.C.A., 1928) 26 F. (2d) 153, 154-155 (cert. den. 278 U.S. 615);

Greiferbiehl v. Hughes Electric Co. (1923) 260 U.S. 735 (cert. den. 264 U.S. 489);

Grable v. Killits (6th C.C.A., 1922) 282 Fed. 185, 196 (cert. den. 260 U.S. 735).

All of these authorities apply the principle declared by this Court in *Adams v. United States ex rel. McCann*, No. 79 this Term, decided December 21, 1942, 87 L. Ed. 209, 211:

"Procedural instruments are means for achieving the rational ends of law. A circuit court of appeals is not limited to issuing a writ of habeas corpus only when it finds that it is 'necessary' in the sense that

> the court could not otherwise physically discharge its appellate duties. Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it. Undoubtedly therefore, the Circuit Court of Appeals had 'jurisdiction,' in the sense that it had the power, to issue the writ as an incident to the appeal then pending before it. The real question is whether the Circuit Court of Appeals abused its power in exercising that jurisdiction in the situation that confronted it."

At pages 32-33 of petitioners' brief it is suggested that if the decision below is upheld, "every ruling striking a plea in abatement or other preliminary plea, as well as every order overruling a demurrer to an indictment, would lay the basis for application for mandamus to the appropriate circuit court of appeals." This imagined evil is without substance. The authorities above cited make clear that the writ may issue only in exceptional cases and this limitation has been, and of course will continue to be, strictly observed.

Like considerations completely distinguish *Cobbledick v. United States* (1940) 309 U.S. 323, quoted at pages 31-32 of the Government's brief, and the other matters concerning criminal appeals set forth at page 34 of that brief. To sustain the right of an appeal from an interlocutory order in every case is far different from recognizing the power of an appellate court to issue mandamus in exceptional instances.

B. Section 1011 of the Revised Statutes (28 U.S.C. 879) Did Not Deprive the Circuit Court of Appeals of Power to Issue the Writ in This Case.

Petitioners contend that the Circuit Court of Appeals was without power to issue the writ of mandamus because of section 1011 of the Revised Statutes (28 U.S.C. 879), which provides:

> "There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

The contention is that under this statute the Circuit Court of Appeals has no power to reverse for error in the trial court's ruling striking the pleas, because the error is one "in ruling [a] plea in abatement, other than a plea to the jurisdiction of the court"; that since the court is without power on appeal to reverse for error in the challenged ruling it had no power to correct the ruling on mandamus.

We submit that this contention is without merit for the reasons: (1) respondents' pleas are pleas to the jurisdiction of the court and are therefore within the express exception in the statute, (2) this statute does not apply to criminal proceedings, (3) if the statute were applicable it would only provide an additional reason why a writ of mandamus should issue, and (4) regardless of the meaning and application of R. S. 1011, the Act of May 9, 1942, removes any question as to the power to issue mandamus.

1. **Respondents' pleas are pleas to the jurisdiction of the court.**

The pleas in terms are pleas to the jurisdiction of the court. They allege that by reason of the facts therein set forth,

> "This court has no jurisdiction to entertain any proceeding against any of said defendants based on the indictment herein."[7]

The facts set forth and referred to in the pleas indisputably establish that this allegation of lack of jurisdiction in the court is well founded. If these facts are true, the grand jury had no power to return the indictment, and the purported indictment is **no indictment at all**. Without an indictment the court is without jurisdiction.

In *Ex parte Bain* (1887) 121 U.S. 1, the petitioner sued out a writ of habeas corpus, alleging that he had been tried on an indictment amended on motion of the Government after its return by the grand jury. This Court held that since the indictment was "no indictment of a grand jury" the court had no jurisdiction to try or convict the petitioner, saying (121 U.S., 13-14):

> "It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if

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[7] R. 46. This quotation is from the pleas of the defendants other than the Carnation Company. Like allegations with respect to the jurisdiction of the grand jury appear at pages 89 and 91 of the Enlarged Return. Similar allegations challenging the jurisdiction of the grand jury and of the court appear in the pleas of the Carnation Company (R. 40, 41).

[8] 28 U. S. C. 421, supra, p. 2; *United States v. Johnson* (7th C. C. A., 1941), 123 F. (2d) 111, 118, 120 (now pending before this Court, No. 5 this term; infra, p. 58).

> it were properly presented by indictment, **the jurisdiction of the offence is gone**, and the court has no right to proceed any further in the progress of the case for want of an indictment."

Directly in accord is the decision in *Albrecht v. United States* (1927) 273 U.S. 1, 8, where the Court, citing *Ex parte Bain*, held that

> "A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court,"

and that a court "may acquire jurisdiction over the person of the defendant" only "When there was an appropriate accusation either by indictment or information, . . ."

There is, of course, no ground of distinction between an "indictment" which is no indictment at all because it has been amended, as in *Ex parte Bain*, supra, and an "indictment" which is no indictment at all because it was returned by a grand jury without power to return it. Having no power, the members of the jury do not act as a grand jury and the effect of their action is nothing more than if a group of bystanders had handed to the court a paper labeled "indictment."

In *Ex parte Farley* (C.C. Ark. 1889) 40 Fed. 66, a writ of habeas corpus was issued releasing petitioners who had been convicted on an indictment returned by an alleged grand jury for the United States court at Muskogee. In holding that the court had no power to summon a grand jury and therefore no jurisdiction to try the petitioners, the court said (40 Fed. 69):

> "Jurisdiction in a court to try a case means jurisdiction over the place, the person, and the subject-matter. **That there may be a subject-matter** there must be an act that is a crime, **and** this act must be properly and legally presented before a court. * * * Has the court at Muskogee the power to impanel a grand jury? If it has not such power, the grand jury that found this indictment was an illegal body, and it had no power to accuse any one by indictment. All courts of the United States, whether they be the supreme court of the United States, circuit courts, district courts, United States territorial courts in the territories, or the court for the Indian Territory, established by the act of March 1, 1889, are creatures of the constitution, and the statutes passed in pursuance thereof, and they have only such jurisdictional powers as are conferred by the constitution or by statute. Has the court at Muskogee the power to impanel a grand jury? If it has not this power, **there was no subject-matter properly presented** in the case of Farley and Wilson upon which the court could proceed to try them."

The decision in the *Farley* case was approved by this Court in *In re Mills* (1890) 135 U.S. 263, 267.

Like principles are stated and applied in the recent decision in *United States v. Johnson*, (7th C.C.A., 1941) 123 F. (2d) 111, 118, 120.

And see,

Stewart v. United States (9th C.C.A., 1926) 12 F. (2d) 524;

Stewart v. District Court (9th C.C.A., 1926) 16 F. (2d) 863 (cert. den.; 273 U.S. 755).

To the same effect is the decision of the Circuit Court of Appeals for the Fourth Circuit in *Renigar v. United States* (1909) 172 Fed. 646, where the court said (p. 658):

> "The indictment—and that means of course a valid indictment found and presented according to the settled usage and established mode of procedure—is a prerequisite to the jurisdiction of the court to try the person accused, an indispensable condition and requirement, the absence of which renders the proceedings not simply voidable, but absolutely void."

The cases cited by petitioners do not support their contention that the pleas in the case at bar are not pleas to the jurisdiction of the court within the meaning of section 1011 of the Revised Statutes. No one of these cases dealt with a violation of section 284 of the Judicial Code (28 U.S.C. 421);[3] no one of them involved a plea, such as those in the case at bar, setting up complete lack of power in the grand jury to return the indictment and the consequent lack of jurisdiction in the court.

In conclusion we point out that petitioners have from the beginning conceded that if the facts alleged in the pleas are true the grand jury had no power to return the indictment and the court no jurisdiction over the cause. Indeed, until the filing of the petition for rehearing counsel for the Government, in both brief and oral argument, consistently expressed the view that the pleas are

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[3]The only case in point under this statute is the decision of the Circuit Court of Appeals for the Seventh Circuit in *United States v. Johnson* (1941) 123 F. (2d) 111, hereinafter discussed, where the court held that a plea similar to the pleas here involved went to the jurisdiction of the grand jury and of the court and reversed the decision of the trial court for error in granting the motion of the Government to strike the plea.

pleas to the jurisdiction of the court. Thus, in oral argument before the Circuit Court of Appeals, Government counsel said (Transcript of Argument, p. 34):

> "Finally, the petitioners [respondents here] contend that if the facts they purport to allege in their plea in abatement are true, that the indictment is void and the court below is without jurisdiction. The argument is thoroughly sound.
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> There is no question, your Honor, but what the authority of the grand jury to return a valid indictment depends upon that statute, and if they exceeded the terms of the statute, they had no authority to return the indictment. Therefore, the indictment must be void. And if the indictment is void, the court would be without jurisdiction to try the defendants on the charges contained in the indictment. I agree with that."

2. Section 1011 of the Revised Statutes (28 U. S. C. 879) does not apply to criminal proceedings.

While we submit that the foregoing establishes the lack of merit in petitioners' contention, we also point out that section 1011 of the Revised Statutes (28 U.S.C. 879) does not apply to criminal proceedings. So far as our research discloses, this point has never been presented to or considered by any court, but we believe its validity is clear in the light of the history of the statute.

Section 1011 of the Revised Statutes was derived from section 22 of the Judiciary Act of 1789 (c. 20, 1 Stat. 73, 84). This section, the provisions of which are copied in the footnote,[10] applied only to civil proceedings. When

[10] See. 22. *And be it further enacted*, That final decrees and judgments in civil actions in a district court, where the matter in

the Revised Statutes were enacted section 22 was divided into several sections but there was no substantial change in its phraseology.[11] Accordingly it seems clear that the meaning of the section was not changed and that its scope continued to be confined to the cases enumerated in section 22 of the Judiciary Act of 1789, that is, to civil cases. This conclusion inevitably follows from the decision in

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dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court; or a justice of the Supreme Court, the adverse party having at least twenty days' notice. And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court, the citation being in such case signed by a judge of such circuit court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice. But there shall be no reversal in either court on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability. And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good."

[11] Section 1011 of the Revised Statutes was not enacted in the Judicial Code. It is however retained in the United States Code, with the reference to the circuit court changed to the circuit court of appeals. See 28 U. S. C. A. 879, where there is an editorial comment pointing out that the section was omitted from the Judicial Code and raising the question whether it is presently in force.

Buck Stove Co. v. Vickers (1912) 226 U.S. 205, where the court held that section 1011 does not apply to writs of error from state courts. In reaching this conclusion the court said (p. 213):

> "The provision [R.S., 1011] originated in that section [section 22 of the Judiciary Act] and was there associated with other provisions which unmistakably show that it was intended to embrace only writs of error to the circuit and district courts. At the time of the revision in 1873, § 22 was divided into several shorter sections and included in the revision according to an arrangement, adopted for purposes of convenience only, whereby the several parts of the original section became more or less separated; **but that in the absence of some substantial change in phraseology, did not work any change in their purpose or meaning**. Rev. Stat., § 5600; *Hyde v. United States*, 225 U.S. 347, 361; *McDonald v. Hovey*, 110 U.S. 619. This is a writ of error to a state court, and so our power to review the ruling upon the plea in abatement is not affected by § 1011."

Section 5600 of the Revised Statutes, referred to in the above quotation, provides:

> "The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed."

In accord is

Hyde v. United States (1912) 225 U.S. 347, 361.

It is true that section 1011 (28 U.S.C. 879) has been mentioned in a comparatively few decisions on writs of error seeking review of rulings on pleas in abatement in criminal proceedings. These cases are cited at page 21 of the Government's brief. In virtually all of these cases the statute was applied as a secondary ground of decision after the appellate court had considered the merits and independently sustained the ruling of the trial court. Moreover, in none of these cases was the point considered; in none were the compelling considerations now before this court presented. These cases are "entitled to no more weight by way of precedent than the [erroneous] exercise of appellate jurisdiction *sub silentio*" (*United States v. Sanges* (1892) 144 U.S. 310, 319-321). We call particular attention to the *Sanges* case because in that case this Court, notwithstanding its prior inadvertent exercise of jurisdiction in certain criminal cases, refused to treat those cases as precedents and announced appropriate jurisdictional limitations when the question of its jurisdiction was raised for the first time.

The conclusion that the statute does not apply to criminal appeals is strongly fortified by the fact that in many cases this Court and the circuit courts of appeals have reversed for errors in rulings on pleas in abatement without any reference to section 1011.

See, for example:

Crowley v. United States (1904) 194 U.S. 461;

United States v. Johnson (7th C.C.A. 1941) 123 F. (2d) 111;

Dunn v. United States (5th C.C.A. 1917) 238 Fed. 508;

Breese v. United States (4th C.C.A. 1906) 143 Fed. 250.

In numerous other cases this Court (e.g., *Agnew v. United States* (1897) 165 U.S. 36), and the circuit courts of appeals (e.g., *Olmstead v. United States* (9th C.C.A. 1927) 19 F.(2d) 842, 844-846; *United States v. Parker* (3d C.C.A. 1939) 103 F.(2d) 857, 859-860), have passed upon the merits of rulings on pleas in abatement in criminal cases and have affirmed those rulings on the merits without mention of the statute.

3. If Section 1011 of the Revised Statutes were applicable this would provide an additional reason why mandamus should issue.

Petitioners argue that if the court below cannot reverse on writ of error (appeal) for error in the ruling of the trial court on the plea, it has no power to correct the ruling by mandamus. The contrary, we submit, is true. The test of the **power** of the court to issue mandamus is whether the "case" in which the ruling occurs is one within its appellate jurisdiction (*Ex parte United States* and other cases cited and quoted at pp. 18-28, supra). The fact that such a ruling (as is true in the case at bar) may ultimately be reviewed on appeal from the final judgment does not prevent the issuance of mandamus where special circumstances warrant the exercise of the power to issue the writ (see pp. 17-28, supra). But if such a ruling is not reviewable at all, then this in itself is a special circumstance which warrants the issuance of the writ. In *Maryland v. Soper* (1926) 270 U.S. 9, the fact that the state under no circumstances could obtain review on writ of error of the order of the district court refusing to remand the case was the principal reason this Court

exercised its power to issue the writ. A like consideration moved the Court to issue the writ in *Ex parte Bradley* (1868) 7 Wall. 364, 376, and *Ex parte Robinson* (1873) 19 Wall. 505, 513; 19 Wall. 513, 514, where the rulings complained of were orders of the lower courts disbarring attorneys. No appeal or writ of error lay to review such orders.

And see:

Virginia v. Rives (1879) 100 U.S. 313, 323 (also the concurring opinion of Mr. Justice Field, at pages 327-330);

Travelers' Protective Ass'n v. Smith (4th C.C.A., 1934) 71 F.(2d) 511, 512-513;

Ex parte United States (1932) 287 U.S. 241, 246.

The only authorities cited by petitioners in support of their position that section 1011 of the Revised Statutes prohibits the issuance of mandamus in this case are cases dealing with section 28 of the Judicial Code (28 U.S.C. 71). That statute, however, is entirely different. It provides:

> "Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, **such remand shall be immediately carried into execution**, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

In holding that this statute took away the remedy by mandamus as well as by appeal and writ of error, this

Court said (*In re Pennsylvania Co.* (1890) 137 U.S. 451, 454):

> "In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and **it is unquestionably a general rule, that the abrogation of one remedy does not affect another.** But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' **in addition** to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

Section 1011 of the Revised Statutes contains no language like that in section 28 of the Judicial Code—"such remand shall be immediately carried into execution"—which indicates an intent to take away the remedy by mandamus. The decision in *In Re Pennsylvania Co.*; far from casting doubt upon the power of the court to issue the writ, is an authority strongly in support of that power.

4. The Act of May 9, 1942, removes any question as to the power of the court below to issue mandamus.

The Act of May 9, 1942, amending the Criminal Appeals Act of 1907 (18 U.S.C. 682; 28 U.S.C. 345), provides for appeals by the United States to circuit courts of appeals

> "From a decision or judgment quashing, setting aside, or sustaining a demurrer **or plea in abatement** to any indictment * * * except where a direct appeal to the Supreme Court of the United States is provided by this Act."

Since the enactment of this statute no question can remain as to the power of the court below to issue mandamus. The writ directs the trial court to proceed to an adjudication, which, if adverse to the Government, may be reviewed directly by the Circuit Court of Appeals. The power to issue the writ in this situation is settled.

Ex parte United States (1932) 287 U.S. 241;
McClellan v. Carland (1910) 217 U.S. 268, 280;
Barber Asphalt Pav. Co. v. Morris (8th C.C.A., 1904) 132 Fed. 945, 955.

Ex parte United States, first above cited, is directly in point. There the district court had made an order denying an application for the issuance of a bench warrant. No review of this order could be had by the United States (or defendant) at any time. Nevertheless, on the Government's application, this Court issued mandamus directly to the district court, commanding that court to set aside its order and to issue the warrant. Answering a challenge to its power, the Court said (287 U.S., 246):

> "Perhaps it would be enough to satisfy the test afforded by these decisions to point to the limited authority of this court under c. 2564, 34 Stat. 1246,

> U.S.C., Title 18, §682 (U.S.C. Title 28, §345) [the Criminal Appeals Act] to exercise direct appellate jurisdiction to review a decision of the district court in the possible event that some action of that court might give rise to a right of review at the instance of the government. We prefer, however, to put our determination upon the broader ground that, even if the appellate jurisdiction of this court could not in any view be immediately and directly invoked, the issue of the writ may rest upon the ultimate power which we have to review the case itself by certiorari to the circuit court of appeals in which such immediate and direct appellate jurisdiction is lodged."

The scope of this ruling is evident when it is remembered that the United States—at whose suit the writ of mandamus issued—could not have appealed to the Circuit Court of Appeals. Appeals by the United States in criminal cases are confined to those provided in the Criminal Appeals Act (now amended by the Act of May 9, 1942). The case could have been taken to the Circuit Court of Appeals and thereafter to this Court on certiorari only if the defendant appealed after final judgment.

For each of the foregoing reasons we submit that the court below had power to issue the writ of mandamus and correctly did so if there are present in this case such "special circumstances" as appropriately moved the court to exercise its discretion to that end, and we turn to that question.

C. There are present in this case "special circumstances" which sustain the exercise of discretion by the court below in issuing the writ of mandamus.

Among the "special circumstances" which have been held sufficient to require the exercise of the power to issue a writ of mandamus are the following—all of which are present in this case:

(1) That the action of the trial court has denied respondents the right to trial by jury.

Ex parte Simons (1918) 247 U.S. 231;
Ex parte Peterson (1920) 253 U. S. 300;
Ex parte Skinner & Eddy Corp. (1924) 265 U.S. 86;
Whittel v. Roche (9th C.C.A., 1937) 88 F.(2d) 366, 371.

(2) That the questions presented involve matters of public importance in the administration of justice.

Ex parte United States (1932) 287 U.S. 241;
Los Angeles Brush Corp. v. James (1927) 272 U.S. 701;
McCullough v. Cosgrave (1940) 309 U.S. 634.

(3) That the matters presented involve the jurisdiction of the trial court.

Virginia v. Rives (1879) 100 U.S. 313, 323;
Ex parte Bransford (1940) 310 U.S. 354, 355;
Ex parte Northern Pac. R. Co. (1929) 280 U.S. 142;
Stratton v. St. Louis S.W. Ry. (1930) 282 U.S. 10, 16.

(4) That no appeal lies from the challenged order and if the parties are remitted to relief on appeal

from a final judgment they and the courts will be subjected to the burden of a long and expensive trial which ultimately must be held to have been required under a mistake.

Ex parte Simons (1918) 247 U.S. 231;
Ex parte Peterson (1920) 253 U.S. 300;
Ex parte Skinner & Eddy Corp. (1924) 265 U.S. 86.

1. By the action of the trial court respondents have been denied a jury trial on their pleas.

Under the rule obtaining at common law[12] and preserved by the Constitution and statutes of the United States, respondents became entitled, upon the joinder of issue by the Government, to a trial by jury on their pleas.[13] They demanded a jury trial, their right to it was conceded by government counsel, and the court set the case down for jury trial (R. 9). Thereafter respondents' right to a jury trial on these pleas was denied by the action of the court

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[12] "When the issue is joined upon a plea in abatement or replication thereto, the venire may be returned, and the trial of the point by a jury of the same county proceed instanter."
Wharton's Crim. Law, 5th Ed., 1861, sec. 537, p. 249.
And see:
4 Bl. Com. (15th Ed.) c. 26, III, p. 334;
1 Chitty, Criminal Law (3d Am. Ed. 1841) 450.

[13] Constitution, Article III, section 2, clause 3;
Constitution, Amendment VI;
R.S., sec. 566 (28 U.S.C. 770), derived from sec. 9 of the Judiciary Act of 1789, 1 Stat. 76;
Heike v. United States (1910) 217 U.S. 423, 427;
Jones v. United States (9th C.C.A., 1910) 179 Fed. 584, 592;
Mulloney v. United States (1st C.C.A., 1935) 79 F.(2d) 566, 573;
United States v. Shaw (S.D. Cal., 1940) 33 F. Supp. 531, 532;
Cyc. Fed. Proc., Vol. 5, §2143, p. 592.

in striking the pleas. No appeal lies from this ruling; mandamus is the **only** remedy available to respondents to preserve to them their right to a jury trial.

It is no answer, as pointed out in *Ex parte Simons, Ex parte Peterson,* and other like cases (supra, pp. 18-20), that respondents will, after reversal and remand on final judgment, obtain a jury trial. If the court's order refusing to reinstate the pleas and set them down for jury trial is erroneous it should " 'be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held to have been required under a mistake' " (*Ex parte Peterson,* supra, 253 U.S., 306).

Nor is it an answer, as the Government suggests, that respondents may be acquitted and thus have no need to appeal. Indeed, this emphasizes the appropriateness of the writ, for if respondents are acquitted they nevertheless will have been improperly subjected to a trial on the merits and will forever have been denied their right to a jury trial of the pleas, a right which, under the admitted allegations of the petition for mandamus, is of great value (see p. 54-57, infra).

2. The questions presented involve matters of public importance in the administration of justice.

If the facts alleged in the pleas in the case at bar are true, as the record facts plainly indicate, it cannot be questioned that the most fundamental civil rights of the defendants are involved. The right of an individual not to be called upon to answer a criminal charge until a duly

constituted tribunal has passed upon the question whether he should be brought to trial is as fundamental as the right to a trial itself.

> "The comment has so often been made as to make its reiteration unnecessary that every one threatened with the charge of the commission of a crime has two rights. One is, of course, the right to a fair and impartial trial upon which the question of his guilt is determined; the other is the no less valuable right, and practically the more valuable right, that he shall not be even called upon to answer to a criminal charge until some duly constituted tribunal has passed upon the preliminary question of whether he ought to be brought to trial" (*United States v. Fitzgerald* (E.D. Pa., 1928) 29 F.(2d) 573, 574).

In *United States v. Pardue* (D.C. Tex., 1923) 294 Fed. 543, the court, speaking through Judge Hutcheson, said (p. 548):

> "This court is entirely sensible of the necessity for apprehending criminals, of the advantage of having criminals suffer for their offenses; but it is equally sensible that there is a higher obligation on government than that of catching one more or less offending criminal—the obligation of keeping faith with the individual. * * * when men are convicted of offenses against their government, and in the process of that conviction every right which the genius of their country gives them is extended—they can but submit. When, however, they are convicted through a denial of a substantial right extended to them by their government, they can but despair; and when courts permit a construction of the law which makes the government break faith with individuals, whether offenders or not, then the reason for courts has ceased, and justice is no more."

It is particularly appropriate that these safeguards to liberty should be maintained in cases of the character of the one before this Court, where the criminal indictment has been used as the real punishment. We quote from *Antitrust in Action*, written by Walton Hamilton, one of the attorneys of the Antitrust Division, and published as Monograph No. 16 by the Temporary National Economic Committee, of which former Assistant Attorney General Arnold was a member (pp. 33, 53, 80):

> "As any advocate preparing for a legal bout, **the Antitrust attorney seizes whatever is helpful, discards whatever might tell against him,** draws items together into a purposive picture. He gathers evidence instead of finding facts: pieces together a conspiracy rather than dissects trade practice.
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> **Thus the grand jury has a peculiar role in antitrust.** Its traditional task is to present infractions of the law; the function of industrial analysis has been grafted upon it. In the development its initial office has passed into eclipse. Nominally, the grand jury has the power to indict or refuse to indict; in reality it usually does the will of the prosecuting attorney into whose hands the real discretion has passed.
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> It is, in fact, the criminal indictment, rather than its event in pecuniary penalty or prison sentence, which looms largest in the minds of executives. No respectable citizen wishes to have his name attainted by a formal charge of crime. None relishes the discomfort, the routine, the anxiety of the process of arraignment; none wishes to be fingerprinted in the manner accorded the ordinary criminal. **Thus the stigma of the indictment tends to be the real punishment. The actual penalty comes at the beginning, rather than the end,**

of the trial. The effect is to punish by presumption and not by proof. The accused is branded with the hypothesis of guilt, which in the office, at the club, on the golf links he must rebut as best he can. **The judgment emerges from the verdict of the grand jury; it derives from an ex parte process in which he is not heard in his own behalf."**

But beyond the individual rights of the respondents, there are here involved matters of greatest public importance in the administration of justice. The record establishes a clear abuse of the purposes of section 284 of the Judicial Code (28 U.S.C. 421, quoted supra p. 2). By the unqualified admissions of government counsel, it appears that the prosecuting officers of the Government presented a petition to the district judge representing that certain investigations had been begun; obtained an order granting this petition and continuing the grand jury for the **sole** purpose of completing these investigations; and then submitted to that grand jury matters as to which no investigation had been begun at the time the petition was filed and which therefore were not within the scope of the court's order.

In addition, it appears—again from the admissions of government counsel—that no investigation of any of the matters or defendants in this indictment was begun at any time during the original term of the grand jury, and that the statute—wittingly or otherwise—has been used as a cloak for an abuse of the grand jury process. The provisions of the statute thus violated are not mere formal requirements. The purpose of the provisions allowing the continuance of the grand jury is clear: to avoid the waste of time and effort which would follow upon the expiration of a term in the middle of a bona fide investiga-

tion by a grand jury. The purpose of the **limitation** in the statute is equally clear: no prosecuting officer should be permitted, **for reasons of his own**, to retain in existence any particular grand jury. Such power would be no different from the inadmissible power of a prosecuting officer to select the original members of the grand jury; it would be subversive of the fundamental purposes of the grand jury—to safeguard individuals from official oppression through unfounded prosecution, and to deprive prosecuting officers of the power or opportunity to act oppressively or corruptly.

See

United States v. Lewis (E.D. Mo., 1911) 192 Fed. 633, 638-640.

We submit that the prosecution in this case—by reason of the foregoing, and by reason of its constant shift of position and its resort to technicalities to evade the disclosure of the simple facts which determine the validity of this indictment—has misconceived its duties and taken a position which ought not to be supported. We need not repeat the extraordinary facts which we have already set forth in the statement of the case (pp. 5-14, supra). In both courts below the Government sought to justify its conduct by invoking the policy relating to the secrecy of grand jury proceedings. This position the court below correctly rejected,[14] and it has been abandoned in this Court.

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[14] "Grand Jury testimony is ordinarily confidential • • •. But after the Grand Jury's functions are ended, disclosure is wholly proper where the ends of justice require it." (*United States v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 234. Numerous cases which we cited to the court below are in accord.)

This Court has stated the duties of a prosecuting officer (*Berger v. United States* (1935) 295 U.S. 78, 88):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In accordance with these salutary principles the Government of the United States should not, we submit, resort to technicalities to evade the disclosure of truth; its effort, equally with that of defense counsel, should be directed to having the facts ascertained. The validity of these views in the extraordinary circumstances of this case are, we believe, self-evident and they have authoritative support.

In *Edwards v. United States* (1941) 312 U.S. 473, defendant pleaded in bar that he had appeared before the Securities and Exchange Commission in response to a subpoena and "'after having claimed his immunity against self incrimination, * * * under compulsion, testified under oath, * * * concerning [matters] * * * which are the subject matter of this prosecution * * *.'" (312 U.S., 475). At the time this plea was filed defendant renewed a re-

quest, theretofore refused, for a transcript of his testimony. The trial court denied this request and overruled the plea. In reversing this ruling this Court said (pp. 480, 481, 482):

> "As appears from the preceding statement of the case, the trial court overruled not only the plea in bar but petitioner's motion for production of the transcript, which was certainly the best evidence of whether the testimony before the Commission was sufficiently related to the prosecution to support amnesty.
>
> • • • • •
>
> We find nothing in this record to indicate the desirability of secrecy so far as the testimony of petitioner is concerned.
>
> • • • • •
>
> The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

In *United States v. Central Supply Ass'n* (1941) 37 F. Supp. 890, defendants filed a plea in abatement upon the ground, among others, that the grand jury was improperly influenced by the conduct of an excessive number of Special

Assistants to the Attorney General who appeared before the grand jury in connection with the investigation. The court held that these allegations raised issues of fact sufficient to put at issue the validity of the indictment, but that the pleas could not be sustained because they were not sufficiently supported by the facts of record upon which the verifications were based. **However,** the court allowed the defendants additional time for the filing of supplemental affidavits, saying:

> "If the law has been violated by the grand jury in returning the indictment, the defendants should not and will not be required to answer its charges" (p. 893).

And in connection with the conduct of the grand jury proceedings the court said (p. 894):

> "If the defendants or their counsel, or if any of the grand jurors, counsel for the government, or other officers of this court, know of any facts which indicate a violation of the law or the instructions of this court by the grand jury, it is their duty to inform the court. The court wishes to be secure in the feeling that no defendant will be held to answer an unlawful indictment. And the defendants have a right to share such feeling."

In *United States v. Molasky* (7th C. C. A., 1941) 118 F. (2d) 128, 133, Molasky filed a plea in bar claiming immunity by reason of his testimony before the grand jury. In reversing a ruling by the district court dismissing this plea, the Circuit Court of Appeals said (p. 135):

> "The contention that the plea is not sufficiently specific, in stating Molasky's grand jury testimony, places the Government in a rather awkward position.

It must be remembered that the detailed testimony of a witness before a grand jury is in the possession of the Government and not the witness. That situation is well illustrated in the instant case. Molasky and some of the other defendants attempted by petition to obtain the minutes of the grand jury so that they might determine the propriety of a plea in bar. We have held that this request was properly denied. It is our view, however, when the instant plea in bar was presented, that the Government should have been required to take issue thereon. It had possession of the grand jury minutes, and it alone was in a position to disclose any misrepresentation in the plea. In no other manner could the assertions contained in the plea be dispelled."

3. The questions presented involve the jurisdiction of the trial court.

If the facts alleged in the pleas are true, the indictment is void and the trial court is proceeding in a cause over which it has no jurisdiction (see pp. 30-34, supra). The authorities heretofore cited (p. 43, supra) hold that in this situation the court may appropriately exercise its discretion to issue the writ. We do not contend, as the Government suggests (Brief, pp. 16, 17), that the District Court did not have jurisdiction to determine the sufficiency of the pleas, nor, of course, that that court does not have jurisdiction to try the pleas. In all cases in which jurisdiction is considered the court must make a determination, which clearly is within its power, to determine its own jurisdiction. This may involve a mere consideration of pleadings; ofttimes it involves a trial of issues of fact upon pleas in abatement to the jurisdiction of the court.

See, for example,

Mexican Central Railway v. Pinkney (1893) 149 U.S. 194, 207-209;

Goldey v. Morning News (1895) 156 U.S. 518, 520.

Thus, in the former case this Court said (p. 209):

> "In the present case, when it was established by the facts stated in the plea in abatement, * * * that the plaintiff in error was never brought before the court by any proper or legal process, the Circuit Court was without jurisdiction to proceed in the case; * * *"

The pertinent consideration here is that if the pleas in this case are valid the court is without jurisdiction and all that occurs from this point on must ultimately be held for nought.

4. The ruling of the trial court, if not corrected by mandamus, will uselessly impose upon respondents and the courts the burden of a long and expensive trial.

The hardship and expense which would attend a trial on the merits of this case are extraordinary. Respondents, the defendants in the indictment, are forty-three corporations, associations and individuals comprising by far the greater part of the evaporated milk industry of the United States. They reside in all parts of the United States from New York to San Francisco and from Seattle to San Diego. The indictment covers activities of this large industry in ten western states, Puerto Rico and Alaska, for a period of more than six years. It includes the activities of manufacturers, jobbers, brokers, retailers, and trade associations. Many thousands of separate documents relating to the case already have been subpoenaed from the files of respondents throughout the United States. The

records of the Evaporated Milk Industry (the office operating under the Department of Agriculture) pertinent to the trial of this case, consist by themselves of thousands of documents. It is believed that a trial on the merits would take not less than four months and probably much longer, and would cost a large sum of money (R. 10). Cases of this kind—the so-called "industry indictments"—have exceeded in time and expense any other trials in the history of the Anglo-American law. In *Antitrust in Action*, supra, page 47, Mr. Hamilton of the Antitrust Division points out that the cost to defendants of defending the *Madison Oil Antitrust Case*[15] was between $2,000,000 and $2,500,000. The *Aluminum Antitrust Case*,[16] recently completed, and in which all defendants were exonerated of all charges, cost according to estimates of defendants' attorneys more than $2,000,000 to defend, lasted more than three years, and consumed 364 court days. Of this case the publicity releases of the Antitrust Department itself said:

> "The record of the testimony has reached the unprecedented figure of more than 40,000 pages, in addition to nearly 10,000 pages of exhibits. As the trial has progressed, counsel have been obliged to bring new tables and shelves into the courtroom to hold the growing volumes of the record. When the trial ended today the record covered thirty-two feet."

And again:

> "The Aluminum trial was more than twice as long as the Sugar Institute prosecution conducted in New York in 1933. That trial took six and one-half months of trial days and up to that time was the longest trial in the United States."

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[15] *U. S. v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150.

[16] *United States v. Aluminum Co. of America* (1941) 44 F. Supp. 97.

During the entire period covered by the indictment respondents in the present case were operating under a license issued by the Secretary of Agriculture under the Agricultural Adjustment Act and the Agricultural Marketing Agreement Act (R. 10); indeed, the very day (June 1, 1935) on which the Secretary of Agriculture promulgated the (compulsory) Licensing Agreement is the day alleged in this indictment as the date of the commencement of the alleged illegal conspiracy. At a trial on the merits it would be necessary to call not only the individual respondents and other members of the industry, but also the officials of the Department of Agriculture under whom the license was administered.

The rule that the burden of trial ordinarily is insufficient to warrant a court in issuing a writ of mandamus was announced at a time when trials such as the one facing respondents in this case were unknown to o[illegible] law. Moreover, the burden of such a trial ought not to be considered from the standpoint of respondents alone. If the facts alleged in respondents' pleas are true, a trial on the merits would be a gross and shocking waste of time and expense to the courts and the Government, as well as to respondents. This very point was one of the principal reasons given by this Court for the exercise of the power to issue mandamus in *Ex parte Simons* (1918) 247 U.S. 231, *Ex parte Peterson* (1920) 253 U.S. 300, and *Ex parte Skinner & Eddy Corp.* (1924) 265 U.S. 86.

The public interest is now further involved by reason of the fact that a useless trial would seriously impair war service of the greatest importance being rendered by respondents (R. 71).

These facts, we emphasize, are not advanced to suggest that violations of law should not be punished because of the hardship of trial or because particular defendants happen to be engaged in activities of importance in the prosecution of the war. They are advanced solely in support of the eminently valid position that respondents and the courts should not be put to the burden of an excessively long and costly trial on the merits **if ultimately it must be held that that trial was utterly futile because the indictment from the very beginning was void.**

The question whether the indictment is void is one which can be determined in a matter of hours.

II.

THE ORDER OF THE DISTRICT COURT STRIKING THE PLEAS WAS ERRONEOUS.

In this section of its brief the Government contends that if the Circuit Court of Appeals had jurisdiction to issue mandamus, it still should not have issued the writ, because the District Court's ruling striking the pleas was right. To prove the ruling right, the Government argues (a) that the pleas were formally defective and failed to show a violation of the statute,[17] or of the court's order continuing the authority of the grand jury,[18] and (b) that if such violation were shown, it would be legally immaterial.

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[17]Section 284 of the Judicial Code, quoted supra, p. 2.
[18]R. 48, quoted supra p. 7.

A. The pleas allege facts showing violation of (1) section 284 of the Judicial Code, and (2) of the court's order continuing the authority of the grand jury.

Referring to the jurisdictional defense based on the statute, the pleas allege in express terms that no investigation was begun in the November 1940 Term or prior to the March 1940 Term (Carnation Company's pleas, R. 39, 40; other defendants, R. 44, 46).

In *United States v. Johnson* (7th C.C.A., 1941) 123 F. (2d) 111, pleas similarly alleged (p. 117):

> "• • • that 'no investigation of said matters was begun at the December 1939 Term,' and 'the investigation of said matters was first begun at said March 1939 Term of Court.'"

In holding these allegations sufficient, the court said (p. 120):

> "We are not unmindful of the rule invoked by the Government that pleas in abatement and those of a kindred nature must be strictly construed. Facts must be stated, not conclusions. Here, however, the allegations were direct and positive. It is difficult to see how they could have been more specific. The challenge went to the very heart of the authority of the Grand Jury to act. The Government's motion to strike should have been overruled and the Government required to answer. The defendants were entitled to an opportunity to offer evidence in support of the motion and plea."

See also,

Edwards v. United States (1941) 312 U.S. 473, 479-482.

Presumably, therefore, if the pleas had stopped with the allegation that the investigation was not begun in the November Term that would have been sufficient. The Government's point is that additional evidentiary facts are pleaded which are not consistent with the ultimate allegation.

But in drawing the pleas respondents faced the requirement, which in fact the Government later relied upon, that sufficient evidentiary facts to show cause for the allegations must be pleaded in a case like this. As stated by the Circuit Court of Appeals (R. 133):

> "It is claimed by the respondent [the Government], however, that in order to present a proper plea the petitioners [respondents in the Supreme Court] could not rely upon the general allegation that no investigation had begun prior to the expiration of the term in which the jury was impaneled, because the proceedings of the grand jury are secret and it must be assumed that unless otherwise alleged the defendant had no information on which to base the general allegation."

After making the above statement the Circuit Court of Appeals went on to say (R. 133):

> "Assuming without deciding that this is true, a careful consideration of the allegations in the pleas indicates that the petitioners had good ground for their allegations. We do not intend to set up these allegations in detail, but they are based upon the statements of the United States attorney that the 'investigation' did not begin until the 28th day of February, two days before the end of the term in which the jury was impaneled and upon the minutes of the grand

jury for the 27th and 28th of February which were disclosed by the United States in response to the demand of the petitioners."

The Circuit Court of Appeals also said (R. 134):

"We conclude that the petitioners allege sufficient evidentiary facts to justify their general allegation that the investigations of their alleged crimes were not begun before the end of the term in which the jury was impaneled, and that the government's denial raised a factual issue which should be tried."

The evidentiary facts to which the Circuit Court of Appeals referred, which are all stated or referred to in the pleas, include not only the facts shown by the minutes which alone are sufficient to show probable cause (infra, pp. 62-63), but also the facts established by the proceedings in open court. These have already been summarized in the statement of the case in this brief (supra, pp. 5-16). Without repeating everything there said, the following high lights may be restated.

The commencement date of the investigation was first put around November 6, 1940, early in the November Term (R. 5, 30-31):

But if this were the date, then the indictment had been returned by a grand jury whose personnel had been changed in the middle of the investigation, because at the end of the November Term five grand jurors were excused and five new persons added (R. 26-27). This fact, coupled with the record of absences by grand jurors during the sessions (R. 37-38), proved that probably a majority and certainly a substantial number of the grand jurors had

not participated in all the proceedings on which the indictment was presumably founded.

Respondents seasonably made this point; to meet it government counsel shifted position and stated that only "routine matters" were considered in the November Term (R. 6), and that the investigation of this case commenced on February 28th, the last day on which the grand jury sat at that term (R. 32).

But by petition previously filed on February 26th (R. 22-23) the Government had alleged that "certain investigations *have been begun*" (R. 47) by the grand jury and had asked the court to authorize the grand jury to continue to sit during the March 1941 Term "solely to finish said investigations begun but not finished" (R. 4, 47; quoted supra, p. 6). The contentions that this investigation was commenced on February 28th, but was nevertheless included within the pending proceeding mentioned in the petition of February 26th, are, of course, irreconcilable.

Having given the date as February 28th, government counsel also stated it as "on or about February 28th" (R. 33). Pressed to be more specific, government counsel put the date at February 27th, and in so doing read the purported extract from the grand jury minutes already referred to (R. 33):

> "Mr. Dunne. Would you give us a date, because 'on or about February 28th' would indicate that it might not have been until March 1st.
>
> Mr. Burdell. That is just what I am about to do. By order of your Honor I was able to get the grand jury minutes at recess. Now, on February 28th—now, I have before me the minutes of the grand jury dated

February 28th. In these minutes the following recitation appears:

'Minutes of the previous meeting read and approved, as corrected (see below).' Then below it says: 'The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun.'

These refer back to the February 27 minutes, so, as I understand these minutes of the grand jury the investigation was begun on February 27."

This gets us down to the whole nub and essence of the Government's point as now made to this Court, i.e., that since the pleas refer to these minutes, and since the minutes list the "Evaporated Milk Industry" among the industries named therein and also state "investigation begun," respondents are bound by the recital in the minutes and cannot allege that the investigation was not begun.

Would a court or jury trying the issue be bound by the words "investigation begun"? Would it be bound notwithstanding that the minutes containing these words were signed (time unknown) after the event by a person who was not the Foreman of the grand jury at the time (supra, p. 14)? Would it be bound to disregard previous inconsistent and conflicting statements of government counsel, all irreconcilable with the minutes? Would it be bound to disregard the allegation in the Government's

petition of February 26th? Would it be bound to find as a fact that the "mention" of "the Evaporated Milk Industry," along with more than a dozen other nationwide industries, conclusively established the commencement of an investigation against any of these respondents or with respect to any matter mentioned in this indictment? What investigation of a dozen or more nationwide industries could be begun in any substantial sense on a single day, so as to justify holding over a grand jury rather than empaneling a new one?

This case deals with a statute definitely limiting the power of a court to continue the existence of a grand jury. The statute speaks in jurisdictional terms. It says that the court may "authorize" the grand jury to continue to sit at succeeding terms, not over eighteen months in all, "solely to finish investigations begun but not finished by such grand jury." Could the court continue the grand jury's life for more than eighteen months, and would an indictment after the eighteen months be valid? If not, as is obvious, then an indictment must be invalid if returned in violation of the provisions in the same sentence of the statute, which limit the subject matter of continuing authority to matters previously begun but not finished. If such indictment is invalid under the statute, it certainly cannot be validated on any theory that courts, juries and defendants are conclusively bound by a recital in the minutes "investigation begun," in the face of facts showing that the investigation was not begun. Furthermore, if the statute has a practical purpose, and is, as we contend, to be enforced according to its terms, then the mere mention

of an industry in the grand jury's minutes cannot authorize investigation of all persons everywhere having any connection with that industry, as the Government's contention necessarily implies.

The Government's brief now suggests (pp. 41-42) that it is "possible" that the Government brought F.B.I. investigators before the grand jury on February 27, 1941, to make the start of an antitrust case against "particular industries." For the reasons given, we submit that this would not show compliance with the statute so as to warrant action against these respondents even if true. Beyond that, the statement is pure supposition, and has, we submit, no proper place in the Government's brief. The Government, and the Government only, knows what happened on February 27th. Notwithstanding repeated requests it has steadfastly refused to tell, for reasons held unsubstantial by the court below. In these circumstances it is not entitled, we submit, to ask this Court to treat suppositions as fact to defeat a trial on these pleas. (See *Edwards v. United States*; *United States v. Central Supply Ass'n*, and *United States v. Molasky*, cited and quoted at pp. 50-53, supra.)

For all the foregoing reasons, we submit that the pleas state facts showing a violation of the statute in that no investigation of this case was begun in the November Term.

We pass now to the point that the grand jury had no jurisdiction because this case was not within the scope of the court's order authorizing its continued existence. The order is quoted supra, page 7.

As already noted, the Government filed a petition on February 26th (R. 22-23), alleging that "certain investigations **have been begun,**" and asking the court's order "authorizing" the grand jury to sit at the March Term "solely to finish **said** investigations begun but not finished."

It is apparently the Government's present position that the investigation was started on February 27th, in which event it could not have been included in the petition of February 26th, or in the court's order made upon that petition (R. 4, 48; quoted supra). However, the Government now claims that the court's order should be construed to include any investigation begun in the November Term, whether before or after the date of the petition or order.

We submit that there is no basis for such an argument. The order in express terms authorized the grand jury to continue solely for the purpose of finishing the investigations referred to in the Government's petition. If the trial court had been told that the Government wanted an order continuing this particular grand jury for the investigation of any number of "industries" who might be "named" to the grand jury at the last minute, the order, we submit, should and would not have been granted. Such an order would rest on a "construction" depriving the statute of all substantial meaning.

We submit that the pleas state facts sufficient to show that there was a violation both of the statute and of the court's order authorizing the continued functioning of the grand jury.

B. The Government's contention that the indictment is valid even if the investigation was not begun in the November 1940 Term is (1) contrary to the statute, and (2) not open to the Government in this Court, because it is first advanced in this Court after certiorari granted and is contrary to the Government's express admissions in both courts below.

The Government's next point against the sufficiency of the pleas is that the statute (Judicial Code, sec. 284; 28 U.S.C. 421, quoted supra) has no effect on the validity of an indictment; a grand jury may be held over and a valid indictment can be returned in a matter of which the investigation was not begun at the prior term.

The Government does not deny that the conduct of the prosecuting officials and of the grand jury in seeking and returning such an indictment is a violation of the statute, or that the point of violation was seasonably raised by respondents. It contends, however, that the statute is only "directory," which means in plain words that the prosecution may with impunity disregard it.

It is settled that the existence of a grand jury depends on the constitution and statutes; unless it has constitutional or statutory authority to act, an indictment returned by it is void (*Ex parte Farley* (C.C. Ark., 1889) 40 Fed. 66, 69; approved by this Court in *In re Mills* (1890) 135 U.S. 263, 267; *United States v. Johnson* (7th C.C.A., 1941) 123 F. (2d) 111, 118, 120, supra p. 30; *Renigar v. United States* (1909) 172 Fed. 646, 658; also cases supra, pp. 30-34).

The Government cites no case for its point, and we know of no case which holds that the statute and not the indictment is to be held ineffective when the grand jury violates an express statutory provision fixing its life or limiting the class of cases it can consider.

And see *United States v. McKay* (D.C. Mich., 1942) 45 F. Supp. 1007, 1013-1015, another authority directly in point

As noted before (supra, p. 63), the statute speaks in jurisdictional terms; it says that the court may "authorize" the grand jury to continue to sit, but not for more than eighteen months, and "solely" to conclude investigations begun but not finished. These provisions are in the same sentence; if the time limitation is jurisdictional, as is obvious, the limitation of subject matter is also jurisdictional.

The provisions of the statute which were violated in this case are not mere formal requirements. One of their obvious purposes is to prevent the prosecution from retaining, at will, a supposedly favorable grand jury (supra, p. 49).

The first answer therefore to the Government's present contention is that it is unsupported, unsound, and contrary to the language of the statute. A second answer is that the contention is not available to the Government in this Court, because it is contrary to the Government's contentions and express admissions in both courts below.

From start to finish, in the District Court and in the Circuit Court of Appeals, the Government assumed, implied, stated and contended that the indictment was void if the investigation was not begun at the November 1940 Term.

The majority opinion of the Circuit Court of Appeals states (R. 133):

> "It is conceded that if these facts are true the grand jury had no power to consider the matter or to return the indictment."

In argument in the Circuit Court of Appeals government counsel said (Transcript of Argument, p. 34):

"Finally, the petitioners contend that if the facts they purport to allege in their plea in abatement are true, that the indictment is void and the court below is without jurisdiction. The argument is thoroughly sound.

* * * * * * *

There is no question, your Honor, but what the authority of the grand jury to return a valid indictment depends upon that statute, and if they exceeded the terms of the statute, they had no authority to return the indictment. Therefore, the indictment must be void. And if the indictment is void, the court would be without jurisdiction to try the defendants on the charges contained in the indictment. I agree with that."

The Government's return to the order to show cause states that respondents' pleas

"were in effect pleas to the jurisdiction of the said November 1940 term grand jury and of the respondent court" (R. 59).

In the trial court government counsel admitted respondents' right to a jury trial on the issue raised by the pleas as to when the investigation was begun (R. 8-9), an admission not to be reconciled with the claim that that issue was legally irrelevant:

"The Court. Are you entitled to a jury as a matter of right?

Mr. Dunne. Yes.

The Court. Are you satisfied he is?

Mr. Burdell. Yes. I don't know what I can do about it if he insists on a jury."

Subsequently the Government changed its position and asked leave to withdraw its traverse of the pleas and to

move to strike them, all as already related (supra, p. 15). Still, however, there was no suggestion that it was immaterial whether the investigation was begun in the November Term or not. There was no suggestion that it was immaterial whether the prosecution and grand jury acted upon new matters in violation of that statute, or in violation of the court's order under the statute, both of which limited the authority of the grand jury to matters begun but not finished in the November Term. There was no such hint or suggestion in the Circuit Court of Appeals, where government counsel argued to the exact contrary of their present contention, nor was there any such hint or suggestion in the petition for certiorari or assignment of errors therein (Petition, p. 5).

Under these conditions, we submit that the case is governed by the rule many times stated by this Court that, after a case has been tried on one theory by both parties, a new and different theory will not be considered when advanced in this Court.

In *Helvering v. Wood* (1940) 309 U.S. 344, 348, this Court held:

> "Though petitioner in his petition for certiorari relied on § 22 (a), respondent in opposition thereto took the position that that point was not available to petitioner here as it was not raised below. In view of these facts, especially the express waiver below, we do not think that petitioner should be allowed to add here for the first time another string to his bow. • • • To open here for the first time and in face of the express disclaimer an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below but to permit a shift to ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation."

In *Helvering v. Tex-Penn Co.* (1937) 300 U.S. 481, the court said (p. 498):

> "The parties presented their respective claims to the board and to the lower court on the theory that, if neither Tex-Penn nor its stockholders as such received any cash from Transcontinental, the transaction would be within § 202 (b). The commissioner's notices of deficiency do not suggest the construction for which he now contends. He sought no ruling upon the question from the board or the lower court and is therefore not entitled to have it decided here. *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 380. The taxpayers were entitled to know the basis of law and fact on which the commissioner sought to sustain the deficiencies."

In *New York Elevated Railroad v. Fifth National Bank* (1890) 135 U.S. 432, the Court said (p. 441):

> "But we are relieved from the necessity of laying down a general rule on the subject, because in this case it clearly appears that the defendant procured or acquiesced in the rulings under which the trial was conducted, and thereby waived the right to object to them."[19]

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[19] See also:
Hormel v. Helvering (1941) 312 U.S. 552, 556;
Helvering v. Minnesota Tea Co. (1935) 296 U.S. 378, 380;
Minnich v. Gardner (1934) 292 U.S. 48, 53;
Burnet v. Commonwealth Imp. Co. (1932) 287 U.S. 415, 418;
Adams v. Mills (1932) 286 U.S. 397, 416-417;
United Railways v. West (1930) 280 U.S. 234, 248-249;
Lutcher & Moore Lumber Co. v. Knight (1910) 217 U.S. 257, 267;
Texas & Pac. Ry. v. Abilene Cotton Oil Co. (1907) 204 U.S. 426, 435;
Minneapolis & St. Louis R.R. Co. v. Winters (1917) 242 U.S. 353;
San Juan Light Co. v. Requena (1912) 224 U.S. 89, 97;
Robinson & Co. v. Belt (1902) 187 U.S. 41, 50;
New York &c. Railroad Co. v. Estill (1893) 147 U.S. 591.

CONCLUSION.

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

Dated, San Francisco, California,
March 26, 1943.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 584.—October Term, 1942.

Honorable Michael J. Roche, United States District Judge for the Northern District of California, Southern Division, et al., Petitioners, *vs.* Evaporated Milk Association, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 3, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The question for decision is whether the Circuit Court of Appeals below rightly issued its writ of mandamus to the district court to correct that court's alleged error in striking respondents' pleas in abatement to a criminal indictment.

An indictment returned in June, 1941, by the grand jury sitting in the district court for Southern California, charged respondents and others with conspiracy to fix the price of evaporated milk sold in interstate commerce in violation of §§ 1 and 3 of the Sherman Act, 15 U. S. C. §§ 1, 3. The indictment recited that the grand jury which returned it had been impaneled at the November, 1940, term of court; that it had "begun but not finished during said November 1940 Term of said Court, an investigation of the matters charged in this indictment"; and that by order of the court the grand jury had continued to sit during the March, 1941, term "for the sole purpose of finishing investigations begun but not completed during said November Term."

In September, 1941, respondents filed pleas in abatement, asking that the indictment be quashed for want of jurisdiction of the court, on averments that the minutes of the grand jury for its meeting of February 28, 1941, disclosed that no investigation of any matter mentioned in the indictment had been "begun" by the grand jury within the meaning of § 284 of the Judicial

Code, 28 U. S. C. § 421,[1] during the November, 1940, term of court, which expired March 2, 1941.[2]

The Government filed replications denying generally all the allegations of the pleas, and the issues thus raised were set for trial before a jury. Thereafter leave was granted to the Government to withdraw its replications and to file demurrers to the pleas, and motions to strike them because insufficient in law, because they failed to state specific facts with sufficient certainty, and because they alleged facts which could not be within the pleaders' knowledge. After argument the district court sustained the demurrers and granted the motions. Respondents thereupon instituted the present proceeding by their petition to the Circuit Court of Appeals for the Ninth Circuit, praying that a writ of mandamus issue directing petitioners—the Honorable Michael J. Roche, district judge, and the district court—to reinstate the pleas in abatement and the Government's replications, and to set the issues raised by the pleas and replications for jury trial.

On the petition for the writ and the Government's return, the court of appeals ordered the writ to issue. Upon rehearing before the full court sitting *en banc* the court held that it had jurisdiction to issue the writ; that the district court had erred in striking the pleas in abatement; that the case was an appropriate one for intervention by mandamus; and that the writ should issue directing petitioners to reinstate the pleas in abatement and the replications, and to try the issues of fact thus raised. 130 F. 2d

[1] That section provides in part:

"A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months . . ."

[2] The grand jury minutes for February 28, 1941, stated:

"Special meeting of the Federal Grand Jury held this day, Foreman Mrs. Hattie H. Slossy presiding. Minutes of previous meeting read and approved as corrected. See below. Special Assistant to the Attorney General Charles S. Pearce and Special Assistant Charles S. Burdell continued the presentation of the peach industry for violation of the Sherman Anti-Trust Act. There being no further business the meeting adjourned."

Then below the following appears:

"The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food Industries were suggested for investigation, and investigation of Sugar Beet Industry was begun. Other industries named as subject for investigation are Salmon Industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland. Asparagus and Cherries."

843. The court of appeals seems to have regarded the district court's order striking the pleas in abatement as in effect a refusal to act upon the pleas. *Id.* 845. We granted certiorari, 318 U. S. , on a petition which set up that the circuit court of appeals erred in directing that mandamus issue, and in holding that the district court erred in striking the pleas in abatement.

Petitioners concede that the circuit court of appeals, like this Court, may, as provided by § 262 of the Judicial Code, 28 U. S. C. § 377, "issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law". *McClellan* v. *Carland*, 217 U. S. 268, 279; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 272-3. They argue that as the district court's order striking the pleas in abatement was an exercise of its jurisdiction, its action is reviewable only on appeal and not by mandamus, and that since by Congressional enactment and policy appellate review of the district court's order may be had only on review of a final judgment of conviction, that legislation and policy are not to be circumvented by resort to mandamus.

We are of opinion that in the circumstances of this case these are valid objections to the exercise by the circuit court of appeals of its discretionary power to issue the writ.

As the jurisdiction of the circuit court of appeals is exclusively appellate, its authority to issue writs of mandamus is restricted by statute to those cases in which the writ is in aid of that jurisdiction. Its authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal. *Ex parte Bradstreet*, 7 Pet. 634; *Insurance Company* v. *Comstock*, 16 Wall. 258, 270; *McClellan* v. *Carland*, *supra*, 280; *Ex parte United States*, 287 U. S. 241, 246; cf. *Ex parte Siebold*, 100 U. S. 371, 374-5; *Ex parte Republic of Peru*, No. 13 Orig., April 5, 1943, and cases cited.

The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. *Ex parte Republic of Peru*, *supra*, p. 4, and cases cited; *Whitney* v. *Dick*, 202 U. S. 132, 136, 140. Hence the question presented on this record is not whether the court below had power to grant the writ but

whether in the light of all the circumstances the case was an appropriate one for the exercise of that power. In determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action. Considerations of importance to our answer here are that the trial court, in striking the pleas in abatement, acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling; and that while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute.

The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Ex parte Peru*, *supra*, p. 4, and cases cited; *Ex parte Newman*, 14 Wall. 152, 163, 169; *Ex parte Sawyer*, 21 Wall. 235, 238; *Interstate Commerce Commission* v. *United States ex rel. Campbell*, 289 U. S. 385, 394. Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal. *Ex parte Harding*, 219 U. S. 363, 369; cf. *Stoll* v. *Gottlieb*, 305 U. S. 165; *Trienies* v. *Sugarloaf Mining Co.*, 308 U. S. 66.

But the present case involves no question of the jurisdiction of the district court. Its jurisdiction of the persons of the defendants and of the subject matter charged by the indictments is not questioned. This is not a case like *Ex parte Bain*, 121 U. S. 1, where the petitioner had been convicted on an indictment which, because it had been amended after it was returned by the grand jury, was thought to be "no indictment of a grand jury." Here the indictment was returned by the requisite number of duly qualified grand jurors, acting under order of the court continuing the grand jury in session. The objection that the subject matter of the indictment was not one which the jury had been or could be continued to hear was at most an irregularity which, if the proper subject of a plea in abatement, did not affect the jurisdiction of the court. Cf. *Ryan* v. *United States*, 226 U. S. 1, 10-11; *Kaizo* v. *Henry*, 211 U. S. 146, 149; *Matter of Moran*, 203 U. S. 96, 104; *Harlan* v. *McGourin*, 218 U. S. 442, 451; *In re Ward*, 173 U. S. 452, 454.

Nor does this case involve a refusal by the district court to adjudicate issues properly presented to it, such as justified the issuance of the writ in *McClellan* v. *Carland*, *supra*. Compare *Ex parte United States*, *supra*. In sustaining the Government's demurrers to the pleas and its motions to strike, the district court did not, as the court below seemed to think, refuse to act on the pleas. Instead, it held that they were insufficient in law to abate the criminal prosecution. In thus ruling on questions of law decisive of the issue presented by the pleas and replications the district court acted within its jurisdiction as a federal court to decide issues properly brought before it. Its decision, even if erroneous—a question on which we do not pass—involved no abuse of judicial power, and any error which it may have committed is reviewable by the circuit court of appeals upon appeal appropriately taken from a final judgment, and by this Court by writ of certiorari.[3]

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[3] In the court below petitioners urged that the decision of the district court in striking the pleas in abatement could not have been reviewed by the circuit court of appeals after final judgment by reason of R. S. § 1011, which has been carried over in substance into 28 U. S. C. § 879. R. S. § 1011 provides:

> "There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

This provision was taken from § 22 of the Judiciary Act of 1789, 1 Stat. 79, 84, a section which was in terms applicable only to civil cases. Neither the Judiciary Act of 1789 nor the Revised Statutes made any provision for review of federal criminal cases on writ of error, although R. S. §§ 651 and 697 provided for certification to the Supreme Court of questions arising in criminal cases. Review on writ of error of criminal cases in the federal courts was first established by the Act of Mar. 3, 1879, 20 Stat. 354, authorizing review of district court decisions by circuit courts. By § 6 of the Act of February 6, 1889, 25 Stat. 655, 656, the Supreme Court was given appellate review of capital cases on writ of error, and §§ 5 and 6 of the Judiciary Act of 1891, 26 Stat. 826, 827-8, abolished the appellate powers of the circuit courts, enlarged the appellate criminal jurisdiction of the Supreme Court, and authorized review of criminal cases tried in the circuit and district courts, by the circuit courts of appeals on writ of error.

None of these acts contains any provision making applicable to criminal cases reviewed on writ of error the limitations which § 22 of the Judiciary Act of 1789 imposed on such review of civil cases. Although R. S. § 1011 is phrased in terms of general applicability, it was held in Buck Stove Co. v. Vickers, 226 U. S. 205, 213, that the rearrangement and rewording in the Revised Statutes of § 22 of the Judiciary Act of 1789 was not intended to change the meaning of that section, and that since § 22 had applied only to cases from federal courts, R. S. 1011 did not prevent consideration of a ruling on a plea in abatement in a case on writ of error from a state court. We think that similar reasoning applies here to preclude the section's application to criminal cases, to which in its original form it did not apply.

In a large number of criminal cases this Court and the circuit courts of appeals have reviewed on the merits decisions overruling or refusing to entertain pleas in abatement, although without reference to R. S. § 1011. Agnew v.

Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record. *Ex parte Morgan*, 114 U. S. 174, 175; *In re Atlantic City R. R. Co.*, 164 U. S. 633, 635; *Ex parte Roe*, 234 U. S. 70, 73; *Ex parte Park Square Automobile Station*, 244 U. S. 412, 414; *Ex parte Riddle*, 255 U. S. 450, 451. Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts, 28 U. S. C. §§ 225(a).[4] Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review an appellate court cannot

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United States, 165 U. S. 36, 43-5; Bram *v.* United States, 168 U. S. 532, 566-8; Crowley *v.* United States, 194 U. S. 461, 468-74; Holt *v.* United States, 219 U. S. 245, 247-8; Hyde *v.* United States, 225 U. S. 347, 372-4; e. g. Dunn *v.* United States, 238 Fed. 508; Breese *v.* United States, 143 Fed. 250, 252-3; Mullaney *v.* United States, 79 F. 2d 566, 572-80; Hillman *v.* United States, 192 Fed. 264, 269-70; Lowden *v.* United States, 149 Fed. 673. A few circuit courts of appeals have said that the section prevented appellate consideration of a decision overruling a plea in abatement to an indictment, although also holding that the pleas were properly overruled. Mounday *v.* United States, 225 Fed. 965, 967 (C. C. A. 8); Luxenberg *v.* United States, 45 F. 2d 497, 498 (C. C. A. 4); Biemer *v.* United States, 54 F. 2d 1045 (C. C. A. 7); United States *v.* Molasky, 118 F. 2d 128, 133 (C. C. A. 7). And the section has on occasion been cited as precluding appellate review of the weight and sufficiency of the evidence in criminal cases—a proposition which hardly needs its support. Miles *v.* United States, 103 U. S. 304, 313; e. g. Jaramillo *v.* United States, 76 F. 2d 700; Rosenberg *v.* United States, 15 F. 2d 179, 181; Jezewski *v.* United States, 43 F. 2d 599, 602; Stocco *v.* United States, 1 F. 2d 612, 613; Kinser *v.* United States, 231 Fed. 856, 861. The fact that the great majority of appellate decisions, including all in this Court, have considered pleas in abatement on the merits, establishes a practice, beginning soon after the first authorization of criminal appellate review, which is persuasive of the statutory intent.

Our conclusion that R. S. § 1011 is inapplicable to criminal cases is reinforced by a consideration of the kinds of objections which in a criminal case may properly be the subjects of a plea in abatement. Although frequently described as a dilatory plea which should be strictly construed, United States *v.* Green, 113 Fed. 683, 688-9, such a plea is an appropriate means of raising objections to an indictment which may involve serious and prejudicial infringements of procedural rights, such as an objection to the qualifications of grand jurors, Crowley *v.* United States, *supra* (compare the Act of April 30, 1934, 48 Stat. 648, 649, 18 U. S. C. 554a); to the method of selection of the grand jury, Agnew *v.* United States, *supra* (cf. Glasser *v.* United States, 315 U. S. 60, 85); or to its composition, see Carter *v.* Texas, 177 U. S. 442, 447.

[4] By the Act of May 9, 1942, Pub. L. No. 543, 77th Cong., 2d Sess., the Government is given a right of appeal from a decision or judgment sustaining a plea in abatement to an indictment or information or any count thereof.

rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Cobbledick v. United States*, 309 U. S. 323. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a "plain evasion" of the Congressional enactment that only final judgments be brought up for appellate review. "The effect therefore of this mode of interposition would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times before there could be a final judgment." *Bank of Columbia v. Sweeny*, 1 Pet. 567, 569. See also *Life & Fire Insurance Co. v. Adams*, 9 Pet. 573, 602; *Ex parte Hoard*, 105 U. S. 578, 579-80; *American Construction Co. v. Jacksonville Ry.*, 148 U. S. 372, 379.

For that reason this Court has consistently refused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a cause to the state court from which it had been removed. *Ex parte Hoard, supra; Ex parte Harding, supra; Ex parte Roe, supra; Ex parte Park Square Automobile Station, supra.*[6] And for the same reason it has held in other cases that the writ will not issue to review an order overruling a plea to the jurisdiction, *In re Atlantic City R. R. Co., supra; Ex parte Chicago, P. I. & P. Ry. Co.*, 255 U. S. 273, 280; cf. *In re New York & Porto Rico S. S. Co.*, 155 U. S. 523, 531, or denying a nonsuit, *Ex parte Lorillig*, 94 U. S. 418, despite the inconvenience to petitioner of being forced to proceed to trial in advance of a review of the court's action. *Ex parte Whitney*, 13 Pet. 404, 408; *Ex parte Perry*, 102 U. S. 183, 186. Here the inconvenience to the litigants results alone from the circumstance that Congress has provided for review of the district court's order only on review of the final judgment, and not from an abuse of judicial power, or refusal to exercise it, which it is the function of mandamus to correct. Hence there are in this case

[6] Mandamus has frequently been used to compel the remand to a state court of a criminal case improperly removed under § 31 33, of the Judicial Code, 28 U. S. C. § 74(6). Maryland v. Soper (No. 1), 270 U. S. 9, and cases cited; Colorado v. Symes, 286 U. S. 510. But removal of such cases involves an extraordinary interference with a state's administration of criminal justice such as to justify an exceptional use of the writ. Moreover, in those cases there was no provision for appeal by the state from an acquittal, Maryland v. Soper, *supra*, 30; cf. United States v. Langes, 154 U. S. 319. And see Kepner v. United States, 195 U. S. 100 with which compare Palko v. Connecticut, 302 U. S. 319, 322 3.

no special circumstances which would justify the issuance of the writ: such as the persistent disregard of the Rules of Civil Procedure prescribed by this court, found in *McCullough* v. *Cosgrove*, 309 U. S. 634 (see *Los Angeles Brush Co.* v. *James*, 272 U. S. 701, 706-8); or the refusal to perform a plain ministerial duty, involved in *Ex parte United States*, *supra*; or the considerations of comity between state and federal courts, thought to be controlling in *Maryland* v. *Soper*, (No. 1), 270 U. S. 9, 29.

The decisions of this Court on which respondents especially rely are not applicable here. In *Ex parte Simons*, 247 U. S. 231, the writ directed the district court to set aside its order transferring to the equity docket a case plainly triable at law by jury. The district court's order was regarded by this Court, "as having repudiated jurisdiction" of the suit. In *Ex parte Peterson*, 253 U. S. 300, in which the writ was sought similarly to compel the district court to set aside its order referring the cause to an auditor, the application was denied because the order was held not to preclude a jury trial. And in *Ex parte Skinner & Eddy*, 265 U. S. 86, the writ prohibited the Court of Claims from exercising jurisdiction, contrary to statute, over a suit which it had previously dismissed. There its assumption of jurisdiction would have deprived the litigants of trial by jury in a state court where an action against an agency of the United States involving the same issue was pending. Thus in the two cases in which the writ was granted, it was issued in aid of the appellate jurisdiction of this Court to compel an inferior court to relinquish a jurisdiction which it could not lawfully exercise or to exercise a jurisdiction which it had unlawfully repudiated. Cf. *Ex parte Republic of Peru*, *supra*. In the present case the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power. In issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted that court's appellate review to final judgments of the district court.

Reversed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.